TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible] 20

WALTER C. BEULOTTE, ET AL., PETITIONERS,

vs.

THYS COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITION FOR CERTIORARI FILED DECEMBER 26, 1963

CERTIORARI GRANTED FEBRUARY 17, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 707

WALTER C. BRULOTTE, ET AL., PETITIONERS,

vs.

THYS COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MARCH 31, 1964

[fol. 2] [File endorsement omitted]

IN THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and JANE DOE BRULOTTE, his wife, Defendants.

COMPLAINT—Filed June 12, 1959

Comes now the plaintiff above named, and for cause of action against the defendants herein, complains and alleges as follows:

1.

That at all times herein mentioned, plaintiff herein, Thys Company, was, and now is, a corporation duly organized and existing pursuant to the Laws of the State of California, and that it has paid all license fees due to the State of Washington.

2.

That at all times herein mentioned, the defendants, Walter C. Brulotte and Jane Doe Brulotte, whose true Christian name is to plaintiff unknown, were, and now are, husband and wife, and as such constitute a marital community, and reside in Yakima County, Washington.

3.

That on or about the 10th day of August, 1948, for valuable consideration, the plaintiff and the defendant Walter C. Brulotte, for and on behalf of said marital community, entered into a written agreement whereby the plaintiff sold and delivered to said defendants and the defendants pur-

chased one certain Thys portable hop picking machine No. 44-L-59, and the plaintiff, as the licensee and holder of certain United States patent rights thereon, granted a license to said defendants for the use of said patented hop picking machine, and said defendants promised and agreed to pay to the plaintiff an annual royalty from the date thereof until the completion of the 1958 hop harvest at the [fol. 3] rate of $3.33⅓ per bale of 200 pounds of dried hops harvested by said picking machine, with an annual minimum royalty of not less than $500.00 plus tax per year. A copy of said agreement is in the possession of said defendants, and the same is incorporated by reference herein. The same provides in part as follows:

"8. For and in consideration of the license, set forth in Paragraph 6 hereinabove, Second Party agrees to pay to First Party a royalty of Three Dollars and Thirty-Three and One-Third Cents ($3.33⅓) per two hundred (200) pounds of dried hops harvested by machines purchased by Second Party, said royalty being payable when the amount of bales picked is determined on or before the 15th day of October of each year during the term hereof, for all hops harvested during the preceding twelve (12) calendar months. In any event the minimum royalty payable hereunder shall be Five Hundred Dollars ($500) per machine per annum, and if the royalties computed at the rate of Three Dollars and Thirty-Three and One-Third Cents ($3.33⅓) per two hundred (200) pounds of hops harvested shall not aggregate as much as Five Hundred Dollars ($500) for each machine in each period of twelve (12) calendar months herein referred to, said sum of Five Hundred Dollars ($500) per machine shall nevertheless be paid to First Party by the following October 15th and any royalties paid on any machine in excess of Five Hundred Dollars ($500) per annum shall not apply against or reduce the minimum royalties payable on any other machines; provided, that if it shall be impossible, in the fair and reasonable judgment of Party of the First Part to use any such machine during any part of a particular picking season because of a serious break-

down or breakdowns of a machine, occurring notwithstanding the exercise of reasonable care on the part of the user or users thereof, an equitable adjustment shall be made of the amount of minimum royalty payable on such machines for such picking season, based upon the number of days during which such machine cannot be used bears to the total number of days in the normal picking season. Second Party agrees that any royalties payable by Second Party may be collected from any source or through any company by the giving of orders to pay if this method is desired by First Party . . .

"9. Second Party will deliver to First Party on or before October 15th of each year during the term hereof, statements in such reasonable details as First Party may request, showing the amount of royalties payable on each machine licensed hereunder and the manner in which such amount was computed. First Party and its agents shall have free access at all times to said machine(s) wherever situated or operated for the purpose of inspecting and observing the operation thereof and determining the amount of hops harvested thereby, and First Party and its agents shall have the right to examine the records of Second Party insofar as may be necessary for the purpose of determining the amount of royalty property payable hereunder. Second Party shall make and preserve proper records showing the amount of hops harvested by means of each of such machine(s) . . .

"11. Second Party concedes the validity of all Letters Patent licensed herein, and further agrees that it will not contest, directly or indirectly, the validity of any herein licensed patent, so long as this agreement remains in full force and effect . . .

"23. The venue of any action commenced by First Party to enforce the provisions of this agreement or of any chattel mortgage given pursuant hereto may, at the option of First Party, be laid in Yakima County, or Sacramento County, California, and in addition to

taxable costs as provided by law, First Party shall be entitled to recover a reasonable sum as attorney's fees in such action."

[fol. 4] 4.

Pursuant to the terms and provisions of said agreement, the plaintiff delivered said hop picking machine to said defendants; and the plaintiff has duly done and performed all of the terms and conditions of said agreement by it to be performed.

5.

Plaintiff has duly made demand upon said defendants for statements showing the quantity of dried hops picked, harvested and processed with said machine or by the defendants during each of said seasons during said period, and showing the amount of royalties payable by the defendants to the plaintiff under said agreement, and the plaintiff has further duly made demand upon the defendants for the payment of the said royalties payable by the defendants to the plaintiff thereunder. The same were payable under said agreement at the rate hereinabove stated on or before October 15th, of each of said seasons. Notwithstanding said demands of the plaintiff, the said defendants have failed and refused to furnish to the plaintiff such statement or information, and said defendants have failed and refused to pay to the plaintiff said royalties or any part thereof, and that no part thereof has been paid.

6.

That each year during said period, the defendants have harvested large quantities of hops with said machine. The plaintiff has no knowledge or information as to the precise quantity of hops so harvested. Defendants have made no royalty payments to the plaintiff for 1953 or any subsequent year. Under state law as construed by the Supreme Court, there is also payable by the defendants a state sales tax in the sum of three and one-third per cent of said royalties. Under said agreement, there is a minimum annual royalty payable in the sum of at least $516.67, including said state sales tax.

7.

The plaintiff has no plain, speedy or adequate remedy at law, and an accounting is necessary in order to ascertain [fol. 5] and determine the amount of royalties payable by the defendants to the plaintiff under said agreement.

8.

Said agreement provides that in any action commenced by the plaintiff herein to enforce the provisions of said agreement, the plaintiff shall be entitled to recover a reasonable sum as attorney's fees in such action, in addition to taxable costs as provided by law. That the sum of $1500.00 is a reasonable sum to be allowed to the plaintiff as attorneys' fees herein.

Wherefore, plaintiff prays that it may have and recover judgment and decree against the defendants herein, requiring the defendants render a full, true and complete accounting and furnish full information and statements as to the quantities of dried hops picked, harvested and processed by the defendants and by the use of said hop picking machine during the 1953 hop harvest season and all subsequent years, and as to the amount of royalties payable to the plaintiff under said agreement for each of said seasons; and that the plaintiff have and recover judgment against the defendants herein in the sum of $3,100.02, or for such greater amount as may be shown by said accounting to be due and owing, together with interest thereon at six per cent per annum from October 15th of each of said years, respectively, until paid, and together with plaintiff's reasonable attorney's fees in the sum of $1,500.00, and plaintiff's costs and disbursements herein to be taxed; and plaintiff prays for such other and further relief as to this court may seem just and equitable in the premises.

Cheney & Hutcheson, Attorneys for Plaintiff.

Duly sworn to by Elwood Hutcheson, jurat omitted in printing.

[fol. 7] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and JANE DOE BRULOTTE, his wife, Defendants.

ANSWER—Filed January 8, 1960

Come now the defendants and in answer to plaintiff's Complaint admit, deny and allege as follows:

1.

In answer to paragraph 1 of plaintiff's Complaint, defendants are without knowledge or information sufficient to form a belief as to the truth of the averment therein contained, and, therefore, deny the same.

2.

In answer to paragraph 2 of plaintiff's Complaint, defendants admit the same.

3.

In answer to paragraph 3 of plaintiff's Complaint, defendants admit the same, except defendants specifically deny that the said promises to pay annual royalty, and to render statements to plaintiff were made for a valuable consideration.

4.

In answer to paragraph 4 of plaintiff's Complaint, defendants deny the same.

5.

In answer to paragraph 5 of plaintiff's Complaint, defendants admit the same except defendants deny that any payments whatsoever were or have been payable under said agreement.

[fol. 8]

6.

In answer to paragraph 6 of plaintiff's Complaint, defendants deny that hops have been harvested each year with the said machine during 1953 or at any time since. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment that plaintiff has no knowledge or information as to the precise quantity of hops harvested by defendants with said machine, and affirmatively allege that no hops whatsoever have been harvested with said machine during 1953 or at any time since. Defendants admit that no royalty payments have been made by defendants to plaintiff during 1953 or at any time since. Defendants deny that any amount whatsoever is payable as Washington State sales tax or otherwise by defendants to plaintiff.

7.

In answer to paragraph 7 of plaintiff's Complaint, defendants deny the same.

8.

In answer to paragraph 8 of plaintiff's Complaint, defendants admit the first sentence therein set forth and deny the second sentence therein set forth.

Pleading further, and by way of a first affirmative defense, defendants allege:

1.

This action is barred by the statute of limitations.

Pleading further, and by way of a second affirmative defense, defendants allege:

1.

On or about the 9th day of August, 1948, plaintiff and defendants entered into a contract in writing, a true and correct copy of which is attached hereto, designated defendants' Exhibit A, and incorporated herein by reference thereto as if fully set forth.

[fol. 9]

2.

Said contract was terminated in accordance with its terms on or about October 15, 1953, by reason of defendants' failure to comply with the terms of said contract.

3.

Any action on said contract is now barred by the statute of limitations.

Pleading further and by way of a third affirmative defense, defendants allege:

1.

On or about the 9th day of August, 1948, plaintiff and defendants entered into a contract in writing, a true and correct copy of which is attached hereto, designated defendants' Exhibit A, and incorporated herein by reference thereto as if fully set forth.

2.

Several of the patents set forth in said contract have been adjudicated and held in courts of competent jurisdiction to be invalid and of no legal effect. The remaining patents, which have not been held and adjudicated invalid, are commercially worthless as a practical matter.

3.

By reason of the determination of the invalidity of said patents as aforesaid, defendants have been evicted in the enjoyment of their privileged use of said hop-picking machine.

Wherefore, having fully answered the Complaint of plaintiff, defendants pr y that the same be dismissed with prejudice, that plaintiff take nothing thereby, and that defen-
[fol. 10] dants be allowed their costs and disbursements herein incurred, hereafter to be taxed.

Velikanje & Moore, By Charles C. Countryman, Attorneys for Defendants.

Duly sworn to by Walter C. Brulotte, jurat omitted in printing.

Proof of service (omitted in printing).

[fol. 11] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and JANE DOE BRULOTTE, his wife, Defendants.

REPLY—Filed January 12, 1960

Comes Now the plaintiff above named and for its reply to the answer of the defendants herein, denies each and every affirmative allegation therein contained, except insofar as the same are alleged or admitted in the complaint and the plaintiff's answers to interrogatories heretofore filed by the plaintiff herein.

Wherefore, having fully replied to said answer, plaintiff prays for judgment and decree as prayed for in its complaint herein and plaintiff prays for such other and further relief as may be just and equitable in the premises.

Cheney & Hutcheson, Attorneys for Plaintiff.

Duly sworn to by Elwood Hutcheson, jurat omitted in printing.

[fol. 12] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY
No. 43602

THYS COMPANY, a corporation, Plaintiff,

vs.

RAYMOND CHARVET and JANE DOE CHARVET, his wife, Defendants.

COMPLAINT—Filed July 14, 1959

Comes now the plaintiff above named, and for cause of action against the defendants herein, complains and alleges as follows:

1.

That at all times herein mentioned, plaintiff herein, Thys Company, was, and now is, a corporation duly organized and existing pursuant to the Laws of the State of California, and that it has paid all license fees due to the State of Washington.

2.

That at all times herein mentioned, the defendants, Raymond Charvet and Jane Doe Charvet, whose true Christian name is to plaintiff unknown, were, and now are, husband and wife, and as such constitute a marital community, and reside in Yakima County, Washington.

3.

That on or about the 31st day of January, 1951, for valuable consideration, the plaintiff and the defendant Raymond Charvet, for and on behalf of said marital community, entered into a written agreement whereby the plaintiff sold and delivered to said defendants and the defendants pur-

chased one certain Thys portable hop picking machine No. 44-L-132, and the plaintiff, as the licensee and holder of certain United States patent rights thereon, granted a license to said defendants for the use of said patented hop picking machine, and said defendants promised and agreed to pay to the plaintiff an annual royalty from the date thereof until the completion of the 1960 hop harvest at the rate of $3.33\frac{1}{3}$ per bale of 200 pounds of dried hops harvested by said picking machine, with an annual minimum [fol. 13] royalty of not less than $500.00 plus tax per year. A copy of said agreement is in the possession of said defendants, and the same is incorporated by reference herein. The same provides in part as follows:

"8. For and in consideration of the license, set forth in Paragraph 6 hereinabove, Second Party agrees to pay to First Party a royalty of Three Dollars and Thirty-Three and One-Third Cents ($3.33\frac{1}{3}$) per two hundred (200) pounds of dried hops harvested by machines purchased by Second Party, said royalty being payable when the amount of bales picked is determined on or before the 15th day of October of each year during the term hereof, for all hops harvested during the preceding twelve (12) calendar months. In any event the minimum royalty payable hereunder shall be Five Hundred Dollars ($500) per machine per annum, and if the royalties computed at the rate of Three Dollars and Thirty-Three and One-Third Cents ($3.33\frac{1}{3}$) per two hundred (200) pounds of hops harvested shall not aggregate as much as Five Hundred Dollars ($500) for each machine in each period of twelve (12) calendar months herein referred to, said sum of Five Hundred Dollars ($500) per machine shall nevertheless be paid to First Party by the following October 15th and any royalties paid on any machine in excess of Five Hundred Dollars ($500) per annum shall not apply against or reduce the minimum royalties payable on any other machines; provided, that if it shall be impossible, in the fair and reasonable judgment of Party of the First Part to use any such machine during any part of a particular picking season because of a serious break-

down or breakdowns of a machine, occurring notwithstanding the exercise of reasonable care on the part of the user or users thereof, an equitable adjustment shall be made of the amount of minimum royalty payable on such machines for such picking season, based upon the number of days during which such machine cannot be used bears to the total number of days in the normal picking season. Second Party agrees that any royalties payable by Second Party may be collected from any source or through any company by the giving of orders to pay if this method is desired by First Party . . .

"9. Second Party will deliver to First Party on or before October 15th of each year during the term hereof, statements in such reasonable details as First Party may request, showing the amount of royalties payable on each machine licensed hereunder and the manner in which such amount was computed. First Party and its agents shall have free access at all times to said machine(s) wherever situated or operated for the purpose of inspecting and observing the operation thereof and determining the amount of hops harvested thereby, and First Party and its agents shall have the right to examine the records of Second Party insofar as may be necessary for the purpose of determining the amount of royalty property payable hereunder. Second Party shall make and preserve proper records showing the amount of hops harvested by means of each of such machine(s) . . .

"11. Second Party concedes the validity of all Letters Patent licensed herein, and further agrees that it will not contest, directly or indirectly, the validity of any herein licensed patent, so long as this agreement remains in full force and effect . . .

"23. The venue of any action commenced by First Party to enforce the provisions of this agreement or of any chattel mortgage given pursuant hereto may, at the option of First Party, be laid in Yakima County, Washington, or Sacramento County, California, and in addition to taxable costs as provided by law, First Party

shall be entitled to recover a reasonable sum as attorney's fees in such action."

[fol. 14] 4.

Pursuant to the terms and provisions of said agreement, the plaintiff delivered said hop picking machine to said defendants; and the plaintiff has duly done and performed all of the terms and conditions of said agreement by it to be performed.

5.

Plaintiff has duly made demand upon said defendants for statements showing the quantity of dried hops picked, harvested and processed with said machine or by the defendants during each of said seasons during said period, and showing the amount of royalties payable by the defendants to the plaintiff under said agreement, and the plaintiff has further duly made demand upon the defendants for the payment of the said royalties payable by the defendants to the plaintiff thereunder. The same were payable under said agreement at the rate hereinabove stated on or before October 15th, of each of said seasons. Notwithstanding said demands of the plaintiff, the said defendants have failed and refused to furnish to the plaintiff such statement or information, and said defendants have failed and refused to pay to the plaintiff said royalties or any part thereof, and that no part thereof has been paid.

6.

That each year during said period, the defendants have harvested large quantities of hops with said machine. The plaintiff has no knowledge or information as to the precise quantity of hops so harvested. Defendants have made no royalty payments to the plaintiff for 1953 or any subsequent year. Under state law as construed by the Supreme Court, there is also payable by the defendants a state sales tax in the sum of three and one-third per cent of said royalties. Under said agreement, there is a minimum annual royalty payable in the sum of at least $516.67, including said state sales tax.

7.

That plaintiff has no plain, speedy or adequate remedy at law, and an accounting is necessary in order to ascertain [fol. 15] and determine the amount of royalties payable by the defendants to the plaintiff under said agreement.

8.

Said agreement provides that in any action commenced by the plaintiff herein to enforce the provisions of said agreement, the plaintiff shall be entitled to recover a reasonable sum as attorney's fees in such action, in addition to taxable costs as provided by law. That the sum of $1500.00 is a reasonable sum to be allowed to the plaintiff as attorneys' fees herein.

Wherefore, plaintiff prays that it may have and recover judgment and decree against the defendants herein, requiring the defendants render a full, true and complete accounting and furnish full information and statements as to the quantities of dried hops picked, harvested and processed by the defendants and by the use of said hop picking machine during the 1953 hop harvest season and all subsequent years, and as to the amount of royalties payable to the plaintiff under said agreement for each of said seasons; and that the plaintiff have and recover judgment against the defendants herein in the sum of $3,100.02, or for such greater amount as may be shown by said accounting to be due and owing, together with interest thereon at six per cent per annum from October 15th of each of said years, respectively, until paid, and together with plaintiff's reasonable attorney's fees in the sum of $1,500.00, and plaintiff's costs and disbursements herein to be taxed; and plaintiff prays for such other and further relief as to this court may seem just and equitable in the premises.

Cheney & Hutcheson, Attorneys for Plaintiff.

Duly sworn to by Elwood Hutcheson, jurat omitted in printing.

[fol. 17] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

No. 43602

THYS COMPANY, a corporation, Plaintiff,

vs.

RAYMOND CHARVET and JANE DOE CHARVET, his wife, Defendants.

ANSWER—Filed January 8, 1960

Come now the defendants and in answer to the Complaint of plaintiff admit, deny and allege as follows:

1.

In answer to paragraph 1 of plaintiff's Complaint, defendants are without knowledge or information sufficient to form a belief as to the truth of the averment therein contained, and, therefore, deny the same.

2.

In answer to paragraph 2 of plaintiff's Complaint, defendants admit the same.

3.

In answer to paragraph 3 of plaintiff's Complaint, defendants admit the same, except defendants specifically deny that the said promises to pay annual royalty, and to render statements to plaintiff were made for a valuable consideration.

4.

In answer to paragraph 4 of plaintiff's Complaint, defendants deny the same.

5.

In answer to paragraph 5 of plaintiff's Complaint, defendants admit the same except defendants deny that any payments whatsoever were or have been payable under the said agreement.

[fol. 18]

6.

In answer to paragraph 6 of plaintiff's Complaint, defendants deny that hops have been harvested each year with the said machine during 1953 or at any time since. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment that plaintiff has no knowledge or information as to the precise quantity of hops harvested by defendants with said machine since January 31, 1951, and, therefore, deny the same. Defendants admit that no royalty payment has been made by defendants to plaintiff during 1953 or any subsequent year. Defendants deny that any amount whatsoever is payable as Washington State sales tax or otherwise by defendants to plaintiff.

7.

In answer to paragraph 7 of plaintiff's Complaint, defendants deny the same.

8.

In answer to paragraph 8 of plaintiff's Complaint, defendants admit the first sentence therein set forth and deny the second sentence therein set forth.

Pleading further, and by way of a first affirmative defense, defendants allege:

1.

This action is barred by the statute of limitations.

Pleading further, and by way of a second affirmative defense, defendants allege:

1.

On or about the 31st day of January, 1951, plaintiff and defendants entered into a contract in writing, a true and correct copy of which is attached hereto, designated defendants' Exhibit A, and incorporated herein by reference thereto as if fully set forth.

[fol. 19]

2.

Said contract was terminated in accordance with its terms on or about October 15, 1953, by reason of defendants' failure to comply with the terms of said contract.

3.

Any action on said contract is now barred by the statute of limitations.

Pleading further and by way of a third affirmative defense, defendants allege:

1.

On or about the 31st day of January, 1951, plaintiff and defendants entered into a contract in writing, a true and correct copy of which is attached hereto, designated defendants' Exhibit A, and incorporated herein by reference thereto as if fully set forth.

2.

Several of the patents set forth in said contract have been adjudicated and held in courts of competent jurisdiction to be invalid and of no legal effect. The remaining patents, which have not been held and adjudicated invalid, are commercially worthless as a practical matter.

3.

By reason of the determination of the invalidity of said patents as aforesaid, defendants have been evicted in the enjoyment of their privileged use of said hop-picking machine.

Wherefore, having fully answered the Complaint of plaintiff, defendants pray that the same be dismissed with prejudice, that plaintiff take nothing thereby, and that defen- [fol. 20] dants be allowed their costs and disbursements herein incurred, hereafter to be taxed.

Velikanje & Moore, By Charles C. Countryman, Attorneys for Defendants.

Duly sworn to by Raymond Charvet, jurat omitted in printing.

Proof of service (omitted in printing).

[fol. 21] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY
No. 43602

THYS COMPANY, a corporation, Plaintiff,

vs.

RAYMOND CHARVET and JANE DOE CHARVET, his wife, Defendants.

REPLY—Filed January 12, 1960

Comes Now the plaintiff above named and for its reply to the answer of the defendants herein, denies each and every affirmative allegation therein contained, except insofar as the same are alleged or admitted in the complaint and the plaintiff's answers to interrogatories heretofore filed by the plaintiff herein.

Wherefore, having fully replied to said answer, plaintiff prays for judgment and decree as prayed for in its com-

plaint herein and plaintiff prays for such other and further relief as may be just and equitable in the premises.

Cheney & Hutcheson, Attorneys for Plaintiff.

Duly sworn to by Elwood Hutcheson, jurat omitted in printing.

[fol. 22] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and JANE DOE BRULOTTE, his wife, Defendants.

No. 43602

THYS COMPANY, a corporation, Plaintiff,

vs.

RAYMOND CHARVET and JANE DOE CHARVET, his wife, Defendants.

STIPULATION AND ORDER FOR CONSOLIDATION
—Filed February 19, 1960

It Is Hereby Stipulated and Agreed by and between the parties herein by their respective counsel that the two above

entitled causes, involving similar issues of law and fact, shall be consolidated for trial.

Cheney & Hutcheson, Attorneys for Plaintiff.

Velikanje & Moore, Charles C. Countryman, Attorneys for Defendants.

Pursuant to the foregoing stipulation, It Is Hereby Ordered that the two above entitled causes are hereby consolidated for trial.

Done in Open Court this 19th day of February, 1960.

[Signature Illegible], Judge.

Presented by:

Elwood Hutcheson, Of Counsel for Plaintiff.

Approved:

Charles C. Countryman, Of Counsel for Defendants.

[fol. 23] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and JANE DOE BRULOTTE, his wife, Defendants.

No. 43602

THYS COMPANY, a corporation, Plaintiff,

vs.

RAYMOND CHARVET and JANE DOE CHARVET, his wife, Defendants.

NOTICE OF TRIAL AMENDMENT—Filed May 26, 1960

To: Thys Company, a corporation,

and

To: Elwood Hutcheson, Cheney & Hutcheson, its attorneys

You, and Each of You, take notice that at the trial of this cause defendants will move to amend their Answer to correct the Answer of Walter C. Brulotte and Jane Doe Brulotte, his wife, to paragraph 6 of plaintiff's Complaint against said Walter C. Brulotte and Jane Doe Brulotte, his wife, and to set forth additional defenses as follows, to-wit:

In answer to paragraph 6 of plaintiff's Complaint, defendants Walter C. Brulotte and Jane Doe Brulotte, his wife, admit that hops have been harvested with the said

machine from the period of 1953 through 1958. No hops have been harvested with said machine since the harvest of 1958. Defendants admit that no royalty payments have been made by defendants to plaintiff during 1953, or at any time since. Defendants deny that any amount whatsoever is payable as Washington State sales tax or otherwise by defendants to plaintiff.

Defendants Walter C. Brulotte and Jane Doe Brulotte, [fol. 24] his wife, and defendants Raymond Charvet and Jane Doe Charvet, his wife, plead further as follows:

Pleading further and by way of a fourth affirmative defense, defendants allege:

1.

At the time of entering into the contracts between the plaintiff and defendants herein, plaintiff represented to defendants that there were twelve (12) patents incorporated into the portable hop-picking machine and that in order to use said hop-picking machines after purchasing them it would be necessary for these defendants to obtain a license to use said hop-picking machines. In truth and in fact, only seven (7) out of the said twelve (12) patents were incorporated into the said hop-picking machines, and plaintiff at all times knew that such was the situation. Said plaintiff further represented to these defendants that the use of said machine was protected by his patents until the expiration of the term of the proposed contract between the parties hereto, whereas in truth and in fact that latest of the said patents actually incorporated into the said hop-picking machines expired in 1957. Such fact was known by plaintiff. All of said representations were made with the intention of plaintiff to induce defendants to enter into the said contracts for a consideration in excess of a reasonable consideration for the use of patents actually incorporated into the said machine, and for a term in excess of the patent monopoly on said patents plaintiff believed itself to be entitled to at that time. These defendants did in fact rely upon the said false representations, there being no contrary information available or readily available. These defendants have subsequently learned that the representations

made by plaintiff were in fact untrue. Said representations were further made by plaintiff to extend its patent monopoly beyond the scope of the privilege awarded to it under the patent laws of the United States and contrary to the anti-trust laws of the United States.

[fol. 25] Dated this 23d day of May, 1960.

Velikanje & Moore, By E. F. Velikanje, Attorneys for Defendants.

Proof of service (omitted in printing).

[fol. 26] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and JANE DOE BRULOTTE, his wife, Defendants.

No. 43602

THYS COMPANY, a corporation, Plaintiff,

vs.

RAYMOND CHARVET and JANE DOE CHARVET, his wife, Defendants.

AMENDED NOTICE OF TRIAL AMENDMENT
—Filed June 22, 1960

To: Thys Company, a corporation, and

To: Elwood Hutcheson, of Cheney & Hutcheson, Its Attorneys:

You, and each of you, take notice that at the trial of this cause defendants will move to amend their answer to correct the Answer of Walter C. Brulotte and Jane Doe Brulotte, his wife, to paragraph .6 of plaintiff's complaint against said Walter C. Brulotte and Jane Doe Brulotte, his wife, and to set forth additional defenses as follows, to-wit:

In answer to paragraph 6 of plaintiff's complaint, defendants Walter C. Brulotte and Jane Doe Brulotte, his wife, admit that hops have been harvested with the said machine from the period of 1953 through 1958. No hops have been harvested with said machine since the harvest of 1958. Defendants admit that no royalty payments have been made by defendants to plaintiff during 1953, or at any time since. Defendants deny that any amount whatsoever is payable as Washington State Sales Tax or otherwise by defendants to plaintiff.

Defendants Walter C. Brulotte and Jane Doe Brulotte, [fol. 27] his wife, and defendants Raymond Charvet and Jane Doe Charvet, his wife, plead further as follows:

Pleading Further and by way of a fourth affirmative defense, defendants allege:

1.

At the time of entering into the contracts between the plaintiff and defendants herein, plaintiff represented to defendants that there were twelve (12) patents incorporated into the portable hop-picking machines and in order to use said hop-picking machines after purchasing them it would be necessary for these defendants to obtain a license to use said hop-picking machines. In truth and in fact, only seven (7) out of the said twelve (12) patents were incorporated into the said hop-picking machines, and plaintiff at all times knew that such was the situation. Said plaintiff further represented to these defendants that the use of said machines was protected by his patents until the expiration of the term of the proposed contract between the parties hereto, whereas in truth and in fact the latest of said patents actually incorporated into the said hop-picking machines expired in 1957. Such fact was known by plaintiff. All of said representations were made with the intention of plaintiff to induce defendants to enter into the said contracts for a consideration in excess of a reasonable consideration for the use of patents actually incorporated into the said machine, and for a term in excess of the patent monopoly on said patents plaintiff believed itself to be

entitled to at that time. These defendants, with the right to do so, did in fact rely upon the said false representations, there being no contrary information available or readily available. These defendants subsequently learned that the representations made by plaintiff were in fact untrue. Said representations were further made by plaintiff to extend its patent monopoly beyond the scope of the [fol. 28] privilege awarded to it under the patent laws of the United States and contrary to the anti-trust laws of the United States. That defendants have no liability to plaintiff under the alleged contracts by reason of the fraudulent representations and actions of plaintiff.

Pleading Further and by way of a fifth affirmative defense, defendants allege:

1.

That under the alleged contracts, plaintiff attempted to restrict the use of the hop-picking machines involved, after sale of the machines. That such attempt is against public policy, unlawful and renders said alleged contracts void and unenforcible.

Pleading Further and by way of a sixth affirmative defense, defendants allege:

1.

The contracts involved in these actions are part of a concerted scheme and effort by plaintiff to unlawfully extend the patent rights beyond the term granted plaintiff under the patent laws of the United States, thereby creating an unlawful monopoly; that by reason thereof these contracts are void, against public policy and not enforcible.

Dated this 21st day of June, 1960.

Velikanje & Moore, By John S. Moore, Attorneys for defendants.

Proof of service (omitted in printing).

[fol. 36]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and JANE DOE BRULOTTE, his wife, Defendants.

No. 43602

THYS COMPANY, a corporation, Plaintiff,

vs.

RAYMOND CHARVET and JANE DOE CHARVET, his wife, Defendants.

Statement of Facts—June 23 and 24, 1960

* * * * * * *

[fol. 42] WALTER C. BRULOTTE, a defendant herein, called and sworn as a witness by plaintiff, was examined and testified as follows:

Direct examination.

By Mr. Hutcheson:

Q. Your name is Walter C. Brulotte.
A. It is.
Q. And what is your wife's name?
A. Cecelia.

Q. Cecelia?
A. Yes.
Q. What is your occupation, Mr. Brulotte?
A. I didn't get that.
Q. Your occupation is a hop grower, is it?
A. Yes, hop grower and cattle.
Q. Showing you Plaintiff's Identification 1, which your [fol. 43] counsel handed me a moment ago, is that your contract with reference to your hop picking machine?
A. Yes.
Q. That is your signature at the end of it, is it?
A. Yes, it is my signature.

OFFERS IN EVIDENCE

Mr. Hutcheson: We offer it in evidence.
Mr. Countryman: No objection.
The Court: It will be admitted.

(Whereupon, said "Agreement" dated August 10th, 1948, was received in evidence as Plaintiff's Exhibit No. 1, and is made a part of this Statement.)

(Whereupon, letters and receipts were marked and included as Plaintiff's Identification No. 2.)

Q. Do you have the original letters that were referred to in the subpoena that you received from me about the payment of royalties?
A. Do you mean that paper there?
Q. Well, the original letters that you received?
A. I think you have those. I think my attorney has those.

Mr. Hutcheson: I have copies here.
Mr. Countryman: These were just recent letters. We have a copy of the original of this top letter. We could stipulate that these copies could go in because the originals are not immediately available.
Mr. Hutcheson: We offer that in evidence.
The Court: There is no objection, I understand?
Mr. Countryman: No.
The Court: It will be admitted.

(Whereupon, said copies of letters and receipts were received in evidence as Plaintiff's Exhibit No. 2, and are made a part of this statement.)

[fol. 44] The Court: What is Exhibit 2, now?

Mr. Hutcheson: Demand letters for the payment of royalties.

The Court: Yes.

Q. With reference to the registry receipt as part of Exhibit 2 here, you identify that as your wife's handwriting and signature there?

A. It ain't mine. It must be my wife's. It ain't my writing. I would say it was hers.

Q. Yes. Let me see, Mr. Brulotte, since entering into the contract with Thys Company, Exhibit 1, August 10th, 1948, let us see, you paid the royalties from 1948 to and including 1952; I believe that is correct, isn't it?

A. Yes, on that certain machine.

Q. By the way this covers two machines, 44-L-55 and 44-L-59, I believe one of those went to somebody else, didn't it?

A. Yes, one was sold to Herke Brothers.

Q. One was sold to Herke Brothers, the 44-L-55?

A. Yes, I think so.

Q. And so you yourself just purchased one and used one of the machines, is that right?

A. Yes. Yes.

Q. Did you pick hops with your machine in 1953?

A. Yes.

Mr. Countryman: Your Honor, that has been admitted in the amended answer.

The Court: Yes, I believe it is.

Q. I will re-state the question. In your answer, as amended, Mr. Brulotte, you admit that hops had been harvested with the said machine from the period of 1953 [fol. 45] through 1958; in other words, 1953 and each year thereafter to and including 1958, is that correct?

A. Well, I picked—I don't—now, don't get me wrong—some years I hired machines to pick and so they didn't pick my entire crop and I had stationary machines come, but they would pick my crop but not all of it.

Q. You hired stationary machines to pick part of your crop?

A. Yes.

Q. Each year or some years?

A. Oh, some years.

Q. But each of those years 1953 to 1958, both inclusive, you did use that particular Thys portable hop picking machine each of those years and you picked part of your crop with this machine each of those years, is that right?

A. Yes.

Q. What was the quantity of hops that you picked with this machine in 1953?

Mr. Countryman: Your Honor, I object to that because we were not going into this point now the way we talked it over in chambers. It seems to me that the theory of the plaintiff is that he is entitled to an accounting and if he is able to do that the Court will order that he account. I think it is improper to bring it into an accounting, the initial facts and figures at this time that the plaintiff hopes to obtain an accounting. I think it is immaterial in this part of the action.

Mr. Hutcheson: We will abide by whatever the Court's ruling on that would be. This is a case where the accounting feature is not particularly complicated, and where the [fol. 46] figures assuming that the witness has them available, will be rather simple as to the quantity of hops picked in each of those years. From a practical standpoint, it would be convenient to the Court and counsel to cover that matter at this time and have the figures in the record and not have to do it later, but we will do whichever way the Court prefers.

The Court: Well, I think that this is an action for an accounting, and if you are entitled to it the Court will order it, but I don't think this is a proper case to have the accounting in, and so I will sustain the objection.

Mr. Hutcheson: You don't believe that this is the proper time?

The Court: No.

By Mr. Hutcheson:

Q. Mr. Brulotte, have you paid any royalties to Thys Company for any year subsequent to 1952; in other words, 1953 and all subsequent years, have you paid any picking machine royalties to Thys Company?

A. Do you mean from 1952 to 1958?

Q. That's right.

A. No.

The Court: Wait a minute, now. I think—isn't it your testimony that you paid royalties through 1952.

A. No, I didn't pay royalties, that is what I meant.

The Court: Oh, yes.

A. I didn't pay royalties from 1952 to 1958.

The Court: That is what I say. The question and answer included 1952. You paid royalties for 1952?

A. Yes, I did.

The Court: But it is 1953 and later that you did not?

[fol. 47] A. Yes, it is 1953 and later.

The Court: All right.

Mr. Hutcheson: Thank you, Your Honor.

A. Yes, that's right.

Q. Just answer this yes or no: Did you keep records as to the quantity of hops that you picked with this machine each year during the period 1953 through 1958?

A. Yes. I have records.

Mr. Hutcheson: In view of the Court's ruling, I believe that those are all the questions I have at this time, then.

Cross examination.

By Mr. Countryman:

Q. Mr. Brulotte, in answer to the last question, have you segregated your records to show how many hops precisely were harvested by your portable hop picking machine or Thys hop picking machine as contrasted with the various years that you hired some?

A. No, I haven't got no separate records. I haven't kept any separate records. I have the total records. I know about how many but I don't know exactly.

Q. You don't have it down to the pound?

A. No, I don't have it down to the pound. When they take the whole crop they have the records that they keep when John I. Haas takes the crop he takes the whole lot.

Mr. Countryman: That is all.

Redirect examination.

By Mr. Hutcheson:

Q. How did you pay for your hops, referring to the portion that was harvested with the portable machine, didn't [fol. 48] you pay by the pound?

A. Yes.

Q. And didn't you have your records of how much you paid for the harvesting of hops with somebody else's stationary hop picking machine during those years?

A. Yes, I have that. I will have to check for that.

Q. And so bearing in mind your total hop production each year and bearing in mind the quantity of hops harvested with the stationary, the difference would be the hops harvested with your portable hop picking machine, wouldn't it?

A. Yes, I presume so.

Mr. Hutcheson: That is all.

Mr. Countryman: No further questions.

(Witness excused.)

Mr. Hutcheson: Mr. Charvet.

(Whereupon, "Agreement" dated January 31, 1951, was marked as Plaintiff's Identification No. 3.)

RAYMOND CHARVET, a defendant herein, called and sworn as a witness by the plaintiff, was examined and testified as follows:

Direct examination.

By Mr. Hutcheson:

Q. State your name, please.
A. Raymond Charvet.
Q. And your wife's name?
A. Blanche.
Q. What is your occupation, Mr. Charvet?
A. Farming.
[fol. 49] Q. And it has been partially hop growing and partially other kinds of crops, has it?
A. Yes.
Q. Showing you Plaintiff's Identification 3, which your attorney handed me a few moments ago, would you just look that over and tell me whether that is your copy of the contract on the Thys hop picking machine?
A. Yes, it is.
Q. That is your signature, is it, at the end?
A. Yes.

OFFERS IN EVIDENCE

Mr. Hutcheson: We offer it in evidence.
Mr. Countryman: No objection.
The Court: It will be admitted.

(Whereupon, said contract dated January 31st, 1951, was received in evidence as Plaintiff's Exhibit No. 3, and is made a part of this Statement.)

Q. What years since you acquired your Thys portable hop picking machine have you produced hops, Mr. Charvet?
A. '48, '49, '50, '51 and '52 and '58 and '59.

Q. In between those two years or those two periods did you completely remove your hopyard, that is, plow out the hops?

A. Yes.

Q. When did you do that?

A. The Fall of '52.

The Court: I didn't get those years, counsel, again, when was that?

Q. Let me see, you produced hops, just to abbreviate it, in 1948 to and including 1952, is that right?

A. Yes.

[fol. 50] Q. And also in 1958 and 1959, is that right?

A. Yes.

The Court: Thank you.

Q. You removed the hopyard in 1952 after the 1952 harvest, is that right?

A. Yes.

Q. And you replanted the hopyard when?

A. In the Spring of 1958.

Q. Handing you Plaintiff's Identification 4, are those copies of letters that you received?

A. Yes, they appear to be, yes.

Q. Do you have the originals?

A. No.

Mr. Hutcheson: Do you have the originals or do you want to stipulate as to those?

The Court: Those are demand letters?

Mr. Hutcheson: Yes, they are of the same nature, demand letters.

Mr. Countryman: No, I have no objection to these copies.

The Court: They will be admitted.

(Whereupon, said copies of letters and receipt for certified mail and envelope were attached and received in evidence as Plaintiff's Exhibit No. 4, and are made a part of this statement.)

Q. Mr. Charvet, I believe you paid the royalties to and including 1952, is that correct?

A. That's correct.

Q. In other words, up until you removed the hopyard?

A. Yes.

Q. Have you paid any royalties to Thys Company, or [fol. 51] any representative of theirs, for any year subsequent to 1952; in other words, have you paid any for 1953 or any subsequent year?

A. I have not.

Q. Do you have records of your hop production in 1958 and 1959?

A. Yes, I do.

Q. Don't answer this until counsel objects, but what was the quantity of hops which you produced and harvested in the Year 1958?

Mr. Countryman: I object to that, Your Honor, on the same basis as the former question to the other witness.

The Court: Objection sustained.

Mr. Hutcheson: I believe that is all at this time, then.

Cross examination.

By Mr. Countryman:

Q. Mr. Charvet, you actually used your Thys type portable hop picking machine up to the Year 1952, is that right?

A. Yes.

Q. From the time you acquired it in 1951?

A. Yes.

Q. When was the last time that machine was used to harvest your hops?

A. The Fall of 1952 in September.

Q. Pardon?

A. The Fall of 1952.

Q. How have you harvested your hops in the last two years?

A. I have had them harvested through custom work with a stationary machine.

[fol. 52] Mr. Countryman: That is all.

Redirect examination.

By Mr. Hutcheson:

Q. Who did your hop picking in the last two years?
A. My cousin Joe Charvet.

Mr. Hutcheson: That is all.
Mr. Countryman: That is all.

(Witness excused.)

OFFER IN EVIDENCE

Mr. Hutcheson: We offer in evidence Plaintiff's Identification No. 5, the certificate from the Secretary of State.
Mr. Countryman: No objection.
The Court: It will be admitted.

(Whereupon, said certificate was received in evidence as Plaintiff's Exhibit No. 5, and is attached and made a part of this Statement.)

Mr. Hutcheson: In view of the Court's ruling, then, I guess that is all I can present for now, and so the plaintiff rests.

* * * * * * *

[fol. 53] EDOUARD THYS, called and sworn as a witness by the defendants, was examined and testified as follows:

Direct examination.

By Mr. Countryman:

Q. Your name is Ed Thys?
A. Yes.
Q. You are President of Thys Corporation, a California corporation, are you not?
A. Yes.
Q. How long have you been connected with the work of harvesting hops by machinery?
A. Do you mean my corporation or myself?
Q. No, yourself, Mr. Thys.
A. Oh, since '35 or '36, I believe.

Q. That was prior to the days of Thys Corporation, was it not?

A. Yes, sir.

Q. When was the corporation actually formed?

A. The business started in 1940 but it was a partnership, Thys and Miller and then it changed to Thys Corporation in—I think in '46, I am not sure.

Q. I see.

A. But it was the same business.

Q. I see. Prior to that time you operated with a gentleman by the name of Mr. Miller?

A. Yes, sir, that is right.

Q. Actually, some of the patents that are listed in Plaintiff's Exhibit 1 and Plaintiff's Exhibit 3 were first obtained by Mr. Miller, were they not?

[fol. 54] A. Well, that is not the same Mr. Miller.

Q. Oh, that is a different Mr. Miller?

A. Yes.

Q. But some of these patents were first obtained by a Mr. Miller?

A. Yes.

Q. What is his name?

A. George E. Miller.

Q. George E. Miller?

A. Yes.

Q. And some of these patents actually listed in the contract were obtained by you, is that so?

A. Yes.

Q. And some of those were obtained by a Mr. Horst, is that so?

A. Yes.

Q. But all of these patents that you yourself obtained as an individual have been assigned to the Thys Corporation?

A. Yes. Originally to the Horst Company and then to the Thys Corporation. I obtained them from the Horst Company.

Q. You obtained them individually from the Horst Company for the corporation?

A. Well, as Thys and Miller.

Q. But eventually they were assigned by Thys and Miller to the Thys Corporation?

A. That's right.

Q. I see.

A. That's right.

The Court: They were first assigned to you personally [fol. 55] and then to the corporation?

A. Yes, to Thys and Miller, which was a partnership.

The Court: And, then, they were assigned to you?

A. Yes.

(Whereupon, document dated April 19, 1938, E. C. Horst, 2,114,712, was marked as Defendants' Identification No. 6.)

The Witness: I beg your pardon, Your Honor, there is a technicality. I don't know if this is of any importance. I recall that the patents were assigned to me personally and the same day I transferred them to Thys and Miller and several days later to Thys Corporation.

By Mr. Countryman:

Q. Mr. Thys, the first patent listed in the contract with both of these parties, as a matter of fact, is Patent No. 2,114,712. That is identified in the contract as the date of issue April 19th, 1938, and the invention as a "Method of Keeping the Picking Fingers of Hop Picking Machines Clean", and this is Identification No. 6 I am handing you, Mr. Thys.

A. If I could have my glasses (glasses handed to witness). Thank you.

Q. Will you please examine that?

A. Yes, uh-huh.

Q. You are familiar with that patent, of course, aren't you?

A. Yes.

Q. That patent, as I understand it, Mr. Thys, and feel free to correct me, if I have any misunderstanding about that patent, that patent covers a method, does it not, of keeping fingers of hop picking machines clean?

A. Yes.

[fol. 56] Q. Actually, it doesn't cover any mechanical device that is actually built into the machine, does it?

A. No.

Q. The method that was obtained by that patent as it was issued, actually is to feed hop vines into a portable machine with coir yarn or some other similar type of string or rope or something of that sort so that as this coir yarn or some similar substance is pulled over the hop fingers the yard through its abrasives or ability to abrase will keep the fingers clean from gummy substance or some other sticky substance that will tend to foul up the fingers; isn't that what that patent was obtained for?

A. Yes, except that you said portable machine. It is the same for a stationary machine, and you said coir twine or similar substance. It is definitely for the coir twine.

• • • • • • •

[fol. 75] By Mr. Countryman:

Q. As I understand the history of your operation, Mr. Thys, you are actually responsible for the construction of the first portable hop picking machine that proved to be the pilot model for all those that were built up here by Lindeman Power Equipment Company, is that right?

A. Yes.

Q. When you first became associated with Mr. Horst and Mr. Miller they had been experimenting with devices for picking hops but it was your idea, was it not, for building hop picking machines was it not?

A. Yes.

Q. And you were responsible for the first portable models?

A. Yes.

Q. And this was down in California, wasn't it?

A. Yes.

[fol. 76] Q. And you later entered into an agreement with the Lindeman Equipment Company here at Yakima, Washington, for them to actually build the hop picking machines up here with the exception of certain parts, isn't that so?

A. Yes.

Q. And you continued in California to build and construct the hop picking fingers they used in the machines?

A. Yes.

Q. The buckets that are used in the machines?

A. Yes.

Q. The vine grasper bar that is used in the machine?

A. Lindeman built those.

Q. You built them for a while and then Lindeman built them, is that right?

A. Yes, I built them for a while.

Q. And actually the brushes you described earlier this morning were shipped up here from California, is that right?

A. Yes.

Q. Now, these parts, the fingers and the buckets and the vine grasper bar were built in your factory in California?

A. Yes.

Q. And they were shipped up here to Lindeman Brothers in Yakima, Washington, and incorporated into new machines that they were building under contract with you?

A. Yes.

Q. Now, when were these machines built by Lindeman Brothers, when were they built, over what period of time?

A. In 1941—from 1941 until 1947.

[fol. 77] Q. I see. So, your pilot model and all had been constructed and used down in California in 1941?

A. Yes.

Q. You had an operating machine that was ready for sale, is that right?

A. Yes, I had built fifteen of them.

Q. Now, then, these parts, the hop picking fingers and the buckets and the parts you were shipping up from California, all of those parts with the exception of the vine grasper bar you have continued to manufacture down in California, is that right?

A. Yes.

Q. And you have shipped them up here to Yakima to Lindeman Brothers or to some other supplier up in the Yakima Valley for sale to the farmer?

A. Yes.

Q. And that is true today, is it not so?

A. Yes.

Q. There has been no one other than you, for instance, that has built the picking fingers that are used and required for use with this machine?

A. No.

Q. Now, then, in these contracts that you have with the defendants, Mr. Thys, and referring to Plaintiff's Exhibit 1, these machines—there are two machines identified in this contract, although it was shown earlier that actually Mr. Brulotte, the other party on this contract only had his during the time we were concerned with in the lawsuit, but these two machines are identified with Serial No. 44-L-55?

[fol. 78] A. Right.

Q. And 44-L-59?

A. That is right.

Q. Now, that "59" is a typographical error, isn't it?

A. No, I don't think so.

Q. You don't think so?

A. No.

Q. What does that serial number mean to you; what does that mean to you?

A. It means the fifty-fifth machine being built and the fifty-ninth.

Q. What is the "44", what does that mean?

A. "44" means the year.

Q. Both of these machines were built in 1944?

A. Yes.

Q. What does the "L" mean?

A. Lindeman.

Q. Built here in Yakima?

A. Yes.

Q. And "55" in one and "59" in the other, that means the number of machines that Lindeman built for you, is that right?

A. Yes.

Q. And so Plaintiff's Exhibit 3, which involves one machine with Ray Charvet, the number 44-L-132 means that it was built in 1944 here in Yakima, machine 132?

A. Yes, that is correct. I think that there has been some fouling up in the year that it was built.

Q. That is what that serial number means?

A. Yes, that is what it means. That is what it indicates, [fol. 79] but I think Lindeman in the numbering fouled up the year. I don't know if it is in these machines or not.

Q. You don't know whether it involved these machines or not?

A. No. But the last number is the serial number of the machine.

• • • • • • •

[fol. 90] By Mr. Countryman:

Q. Mr. Thys, Defendants' Exhibit 10, which we were discussing before the noon recess, being Patent No. 2,139,029, that being the device that had the revolving drums to pick hops with, with the picking fingers attached to the drums, that was basically a stationary type of machine, was it not?

A. Well, I would say that the application as shown on this patent was basically a stationary machine.

Q. That was a separate machine from your portable, is that right?

A. Well, the basic principles are similar but the drawings show the application of a stationary machine.

Q. Now, as I understand it, Mr. Thys, when you first sold these machines to whoever may have been the original pur-[fol. 91] chasers—I am talking about all of the machines that were actually built up here in Yakima by Lindeman Power Equipment Company, when they were sold, you deemed yourself to be selling the title to the machine, you transferred the title of the machine to the purchaser, didn't you?

A. Yes.

Q. And you never claimed at any time that you have any interest in the machine itself except as related to your patents, is that right?

A. Yes.

Q. And so at that time, and as these contracts, Plaintiff's Exhibit 1 and 3 reflect, you obtained a contract with the purchasers of these machines to pay you a royalty based upon the use of those machines, is that right?

A. Yes.

Q. And that was because you had the patents on various devices built into the machine, is that right?

A. Oh, for that and other reasons. For the reasons that they wanted to use the machines and I had to find the way that it could be suitably financed to make it a business proposition.

Q. Yes?

A. And to give the time to pay for the machine.

Q. Yes. And aside from the business consideration you may have had, actually the sole interest you may have had in any of these hop picking machines after they were sold was the patented devices that were incorporated into these machines, isn't that right; you had no power to repossess [fol. 92] these machines or anything of that sort, is that right?

A. No, I had no power to repossess the machines.

Q. If they were destroyed it was the farmers absolute loss, is that right?

A. Yes.

Q. And he had the power to use it, didn't he?

A. Yes.

Q. And this you licensed to him based upon your ownership of the various patents listed in the contracts?

A. Yes, that is so. I sold these machines to the growers and in order to be able to sell them those machines I had to secure those patents for their protection, so that they wouldn't be attacked for infringement.

Q. Well, you were the only person who could have attacked him for infringement?

A. No.

Q. Your predecessors were actually the only ones that had any interest in these patents, is that so?

A. Well, yes, but I had to secure those—in order to sell those machines I had to secure those patents from E. Clemens Horst Company.

Q. Yes, but after you obtained the assignment of these patents from Horst Company you were the owner of those at that time? I am speaking of Thys and Miller and Thys Corporation.

A. Well, in my contract with the Company I was requested to collect the royalties.

Q. Yes, but insofar as infringement, the only fear of infringement would have been from whoever happened to own these patents, is that right?

[fol. 93] A. Yes, but the Horst Company had an interest.

Q. Yes, but that was because of your contract with Horst and not because of anything that was in these contracts, is that right; E. Clemens Horst wasn't a party to these contracts?

A. No.

Q. And in these contracts, Plaintiff's Exhibits 1 and 3, you grant to these defendants a license to use these patents, isn't that so?

A. Yes.

Q. And that was because you were empowered to do that in so far as Horst Company was concerned?

A. Yes.

Q. And you were not empowered to grant anything that E. Clemens Horst claimed you had no right to grant?

A. No.

Q. I notice that these contracts, Mr. Thys, except for the signatures and blank lines and dates and so forth appear on what evidently is a form contract that you have had prepared, marked Form A-2, is that right?

A. Yes.

Q. And this form contract was prepared by your attorneys down in California, wasn't it?

A. Yes.

Q. For Thys Corporation?

A. Yes.

Q. And there were some earlier contracts that were on slightly different forms?

A. Yes.

Q. But they were also substantially the same as these [fol. 94] and they were completed by merely completing the blanks in the contracts with any particular purchaser of the machine, is that not so?

A. Yes. Essentially the difference in these contracts is that they are transfer contracts. They are contracts that are used when one who bought the machine sold to another.

Q. These are three party contracts; aren't they, Mr. Thys, between a former owner and a new owner and you, isn't that right?

A. Yes.

Q. And in a particular case where there wasn't a used machine involved and there was a new machine involved and there were only two parties involved, they would be between you and the purchaser?

A. Yes.

Q. But as far as the royalties on the machine, they were actually the same?

A. Yes.

Q. How many machines were manufactured by Lindeman Power Equipment Company, do you recall?

A. Approximately 200.

Q. Approximately 200 machines?

A. Yes.

Q. And then you manufactured some of those yourself?

A. Yes.

Q. And those were shipped up to Washington?

A. Yes.

Q. Most of these Thys type hop picking machines have been utilized here in Washington, isn't that so?

[fol. 95] A. Yes.

Q. Most of them have been utilized here in Washington, haven't they?

A. Yes.

Q. There are some have been used in California?

A. Yes.

Q. Some have been used in Oregon?

A. Yes.

Q. And some have been used in New York?

A. Yes.

Q. And some have been shipped overseas?

A. Yes.

Q. Some have been used in Canada?

A. Yes.

Q. How many portable hop picking machines have been actually manufactured, do you feel, between your own manufacture and Lindeman's?

A. Well, I think Lindeman manufactured approximately 200 and I have manufactured fifteen.

Q. And so it would be something in excess of 200?

A. Yes.

Q. As to all of these machines when they were sold to the original purchasers, all of the owners agreed upon substantially the same sort of instruments that we are here concerned with, Plaintiff's Exhibits 1 and 3, to pay you a royalty for the use of the machines, isn't that right?

A. Well, not those used overseas.

Q. Well, those used in the United States?

A. Yes.

[fol. 96] Q. Would that be a correct statement?

A. Yes.

Q. In other words, wasn't it your business practice at that time to have these contracts available and if someone wanted to purchase these machines they used this form contract and that was the agreement with the grower?

A. Yes.

Q. And all of them or substantially all of them listed the same twelve patents that are included in this Plaintiff's Exhibit 1 and as they appear on Plaintiff's Exhibit 3, is that correct?

A. Yes. I don't know if this original contract included the last one which was issued in 1943, probably because I didn't have the contract before 1943, that would be the only basis.

Q. Commencing with the Patent No. 2144712, which was issued on April 19, 1938, you always included every patent that you had in the contracts, is that right?

A. Yes.

Q. Now, then, as I understand, Mr. Thys, it was also your practice when one of these machines was sold to license them for a period of seventeen years, is that right?

A. When they were originally sold, yes.

Q. Yes, and that would be seventeen years from the time that the machine was sold new?

A. Yes.

Q. Some of these machines were sold as early as 1939 or 1940?

A. The first harvest was 1941.

Q. 1941?

A. Yes.

[fol. 97] Q. And some of those machines were sold in 1941, were they?

A. Yes.

Q. And they carried the license term which would expire in 1958?

A. 1957.

Q. 1941—seventeen years from the date of sale?

A. Yes, you count 1, 2, 3—and 17—

Q. And some of these machines were sold until about 1947 or thereabouts?

A. Yes.

Q. And it was always your practice to license these machines for 17 years from the date that they were originally sold?

A. Yes.

Q. And so you would have machines out that would expire seventeen years after 1941 and seventeen years after 1942, and so on through seventeen years after 1947, is that correct?

A. Yes, that is correct.

Q. When you entered into this contract with Mr. Brulotte, Plaintiff's Exhibit 1, which is dated August 10, 1948—now that involved a used machine, of course, didn't it?

A. Yes.

Q. That involved a machine that had been manufactured in 1944?

A. Yes.

Q. Did you deal directly with Mr. Brulotte at that time or were your affairs in connection with this handled by someone else?

A. By someone else.

• • • • • • •

[fol. 100] Q. Can you tell from the description which appears on the contracts, Mr. Thys, which patent would in-

[fol. 101] clude the angle iron type supporting bar for the fingers which would be designed to be attached to it?

A. No, that is not listed in these patents.

Q. That is not listed in these patents?

A. Except it is listed under other patents pending.

Q. This other patent pending was not licensed by this contract, was it?

A. Yes. Yes, it is listed with the other patents and it says "Patents Pending".

Q. Then, it is your construction that any patents that you hereafter acquire from the date of the contracts the other party would have license to use it after you acquire it?

A. Any patent that was pending.

Q. At the time the contract was signed?

A. Yes.

Q. Did you have a patent pending on August 10, 1948 for an angle iron type picking bar and supporting bar and fingers to attach to it?

A. Yes.

Q. Was that patent ever issued?

A. Yes.

Q. Was that the patent that was declared invalid in a suit in California?

A. Yes.

Q. It was declared invalid?

A. Yes. And I have had other patents later.

Q. But you had not applied for those on August 10, 1948?

A. I could check on that.

Q. You don't recall now?

[fol. 102] A. No.

Q. Now, on August 10, 1948, did you have a patent pending for the bucket line that was used for the diamond mesh screen for breaking up clusters?

A. That would be in one of these here.

Q. Which one of these?

A. I don't know.

Q. It would be in one of those patents?

A. Yes, in one of those patents. One with the buckets.

Q. You actually invented and tested and worked with the first portable hop picking machine in the United States, didn't you?

A. Yes.

Q. And you were the first commercial manufacturer of a portable hop picking machine?

A. Yes.

Q. To date there has been no other manufacturer of a portable hop picking machine, has there?

A. I don't think so.

The Court: Since when?

Mr. Countryman: To date.

The Court: From when?

Mr. Countryman: From the time he started until the date of this trial.

The Court: Yes.

Q. Rephrasing that, Mr. Thys, you have been the only manufacturer in the United States, at least, manufacturing portable hop picking machines?

A. Yes.

Q. And from the time that you first went into the business [fol. 103] until the present date, June 23, 1960, you have been the only manufacturer of picking fingers for use on portable hop picking machines?

A. No.

Q. Others have manufactured them but they have been licensed from you, haven't they?

A. Yes.

Q. In other words, it has been under your patents that the only picking fingers have been manufactured in the United States?

A. I think so.

Q. And wouldn't it also be a true statement, Mr. Thys, that it is under your patents that the only buckets for catching hops have been manufactured for use in portable hop picking machines or equipment?

A. Yes.

Q. And you have been the sole supplier, have you not, Mr. Thys, up to the present time of the brushes which are designated in Plaintiff's Exhibit 19 as "K" in this diagram, you are the sole supplier of these revolving brushes marked "K"?

A. I don't know.

Q. You don't know about that?

A. I think I am.

Q. You believe you are?

A. I think anybody could manufacture brushes.

Q. Certainly, the brush was never patented?

A. No, it wasn't ever patented.

Q. Have you ever restrained anyone from providing brushes for use with your portable hop picking machines?

[fol. 104] A. No.

Q. As I understand it, Mr. Thys, as you entered into these various contracts there will be something in excess of 200 such contracts or perhaps more because the machines have changed hands, you have been entering into this sort of contract with a great many people, have you not?

A. Yes.

Q. And they were always given the same treatment by you, weren't they?

A. Yes.

Q. They were all licensed to use these twelve patents that are licensed and listed in your contract?

A. Yes.

Q. And under your construction of this contract they were all licensed to use any patents you had pending under these contracts?

A. Yes.

Q. Originally the royalty to be paid in these contracts was $5.00 per 200 pound bale?

A. Yes, sir.

Q. And that was later reduced to $3.33⅓ per bale?

A. Yes.

Q. $3.33⅓ per 200 pound bale of dried hops?

A. Yes.

Q. You did that according to contract?

A. Yes.

Q. And so when the contracts in existence were modified by you so that everyone was receiving the same treatment by you so far as royalty is concerned at any particular time?

[fol. 105] A. Yes.

* * * * * * *

[fol. 107] Q. You have contracts out with the farmers covering the payment of royalties until what year, Mr. Thys?

A. I don't know.
Q. You have some at least until 1962 or 1963?
A. Yes.
Q. Do you have some for 1963?
A. Yes.
Q. Do you have any for 1964, to your recollection?
A. Yes, I must have.
Q. And do you have any for any period after that, to your recollection?
A. I don't know.
Q. You wouldn't know about 1965?
A. I wouldn't know.
Q. I see. And that has been upon the basis of these twelve patents that are listed in the contracts Plaintiff's Exhibits 1 and 3?
A. Yes.
Q. Any other patents that have enabled you to obtain a licensing arrangement until 1965, Mr. Thys?
A. Any other contracts?
Q. Are there any other patents that you have?
A. I have other patents, yes.
Q. That have been acquired since 1943?
A. Yes.

Mr. Countryman: I see.
The Court: What do you mean, patents? Patents on hop picking machines or patents on anything else?
[fol. 108] Mr. Countryman: Well, that is what I am trying to bring up, Your Honor.
The Court: Well, that would be proper.

Q. Do these patents cover anything other than portable hop picking machines?
A. Yes, some of them do.
Q. How many patents do you have for portable hop picking machines outside of these twelve listed in your contracts?
A. Six or seven.
Q. And during what period of time were they acquired by you; I take it, it would be since 1943?
A. Yes, since 1943.

Q. Up until when?

A. I think that the last patent issued pertaining to hop picking machines was issued in 1952.

Q. In 1952?

A. Yes.

Q. I see. Have any of these portable hop picking machines been scrapped, to your knowledge, actually destroyed?

A. Well,—

Mr. Hutcheson: Oh, that is objected to as immaterial.

Mr. Countryman: I want to inquire whether any have been destroyed.

Mr. Hutcheson: I don't think Mr. Sherman of the Sherman Anti Trust Laws cares whether a hop picking machine was scrapped.

The Court: Objection overruled.

Q. Mr. Thys, have you ever consented to the termination of any further payment of royalties by an owner of a hop picking machine when he elected to junk it out and scrap [fol. 109] it?

Mr. Hutcheson: Objected to as immaterial.

Mr. Countryman: Your Honor, in order to show this plaintiff's method of operation, I have to develop some practice.

The Court: It may have something to do with the case. I don't know yet: It may have. Go ahead and answer.

A. Would you repeat the question?

Q. Yes. I say, have you ever consented, Mr. Thys, when some owner of a hop picking machine elected to scrap it or junk it, have you ever consented to that owner terminating any further royalty payments to you?

A. Yes, we have always cooperated with the growers when the contract became a hardship and there was some justifiable reason to terminate the contract we have done so.

Q. Has it been your practice when an owner goes out of the hop business to terminate any further obligation to pay royalties?

A. Well, we have studied every case.

Q. Your construction of these contracts, Plaintiff's Exhibit 1 and 3, it is your understanding of those, it doesn't matter what happens to a machine, if it is scrapped out, he is still obligated to pay you this minimum royalty until termination of the last year provided for in the contract, is that right?

A. Yes.

Q. And any relinquishment or waiver of any payments has just been by grace and not because you were obligated to do it?

A. That's right.

[fol. 110] Q. Mr. Thys, you of course reside down in California and it is only periodically that you get up to this part of the country, isn't that so?

A. Yes.

Q. You by no means have any personal knowledge of the history of these more than 200 hop picking machines that have been sold by you that were manufactured by Lindeman's?

A. Unless the history is brought to my attention.

Q. Has it been your practice, Mr. Thys, to waive payments for a few years in some instances in exchange for the promise to tack on that many years on the end of the contract; in other words, for two or three years a farmer wished to avoid his obligation to pay you royalties, have you ever extended the term of the contract for that period of time and discharged such immediate obligation to pay for the two or three years?

A. Sometimes I have done that but, of course, all of those cases have been negotiated on their merit.

Q. I see. In the contracts that you have, Mr. Thys, that will expire in 1965, that will not expire until then, they have all been negotiated, I presume, since, let me see, 1948, they were for seventeen years, too, weren't they?

A. If my recollection is right, the last contracts and the last machines were built in 1947 or 1948.

Q. And you added seventeen years to that, then?

A. Yes.

Q. And were they, too, on your Form A-2 or a similar type form which listed the twelve patents that are on this contract?

[fol. 111] A. Yes.

Q. And the owners of those machines then were by you licensed to use any of these twelve patents?

A. Yes.

The Court: I didn't get the answer there. He says the last machines were built in 1947. When were the last machines sold, the new machines?

Q. Mr. Thys, could you answer that last question, when were those last new machines actually sold to the farmers?

A. In 1947.

Q. In 1947?

A. In 1947. I am not sure of those dates but it was my understanding it was 1947.

Q. It was always your practice to provide royalties payments for seventeen harvests of hops, is that correct?

A. Yes.

Q. And so if you sold a machine after September after the hop picking season had passed there will be an obligation to pay for the seventeen years afterwards, for example 1948?

A. Yes, that is correct.

Q. And so you would obtain the full seventeen years or the full seventeen hop harvests?

A. Yes.

• • • • • • •

[fol. 113] Q. Do you have the general type of contract, Mr. Thys, which we are concerned here with, which provides for the absolute sale of the machine with the right to use it and the licensing of the owner of the machine with the right to use it, that is the only type of contract you entered into with a purchaser of a machine desiring to use it, is that correct?

A. Yes.

Q. And that would be true of here or Oregon or Cali-

[fol. 114] fornia, or wherever it was sold?

A. Yes.

The Court: That would be so only for the three-party agreements, would it not?

A. I beg your pardon?

The Court: That would be so only for the three-party agreements?

A. For any agreement.

The Court: I mean for the machines is this the type used when you originally sold them?

A. Oh, no, it isn't the type used when we originally sold them.

The Court: Is that what you meant?

Q. Mr. Thys, to clear that up, on a two party agreement, or it may be described as an agreement between you and the original owner of the new type machine, didn't he too acquire an absolute right and title to the machine except for the right to use it?

A. Yes.

Q. And he too contracted with you to pay royalty for the use of the machine?

A. Yes.

Q. And that was because you had these twelve patents that are set forth in the contract that you reserve the right to use it and licensed that out?

A. Yes.

The Court: Then, the two party contracts were virtually the same as these?

A. Yes.

Q. Mr. Thys, except for periodic changes in these ma- [fol. 115] chines, some of which have proven to be improvements and some of which have proven not to be as good as formerly, these machines have substantially the same operation?

A. Yes.

* * * * * * *

[fol. 116] Q. As a practical matter, even today in 1960 with your portable hop picking machines and with any other manufacturer's stationary type machines, it is impossible, is it not, to pick 100 percent clean hops?

A. No, that isn't impossible.

Q. Is that not impossible?

A. Well, it all depends upon what you call 100 percent hops, but by test we have had hops inspected zero-zero and we have had them graded that way.

Q. I see. That is the ultimate and that is what you are always aiming for?

A. Yes. Yes.

• • • • • • •

[fol. 121] Q. Mr. Thys, as I understand it, the experimental work you did on these machines was done in California, is that right?

A. Yes, mostly. Mostly. I did some here, too.

Q. But the original pilot models and the experimentation of the work done developing them was down in California?

A. Yes.

Q. You actually used them in hop fields down there, as I understand it?

A. Yes.

• • • • • • •

[fol. 144] Edouard Thys, called as a witness on rebuttal by the plaintiff, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Hutcheson:

• • • • • • •

[fol. 150] A. It is also a patent incorporated in the defendants' machines. And No. 2,336,280, that is Exhibit 16, it isn't incorporated on the portable picking machines. And, then, I have here a patent which I don't think has been brought into the exhibits. It is No. 2,599,080 which is

a later patent and covered through other patent pendings. They were pending at the time.

Mr. Hutcheson: Will you mark these separately.

(Whereupon, Patent 2,559,080, Letters Patent, was marked as Plaintiff's Identification No. 22.)

Q. Showing you Plaintiff's Identification 22, is this Patent No. 2,599,060?

A. "080", isn't it?

Q. That was issued to you personally?

[fol. 151] A. "080". Yes.

The Court: It is "080"?

A. Yes, "080".

Q. Pardon me, "080", it is my mistake. Let me see, the date of issuance was June 3rd, 1952, is that correct?

A. That is correct.

* * * * * * *

Mr. Countryman: Mr. Thys, this patent, of course, is not one that is listed in the contracts, Plaintiff's Exhibits 1 and 3, is it?

A. Except for the patent pending.

Mr. Countryman: And I believe you testified yesterday that it was your construction of these contracts, at least, that as to any patents pending at the time the contract was signed the purchasers were licensed to use those patents if they were eventually issued by the patent office?

A. Yes.

[fol. 152] Mr. Countryman: Did you ever inform either Mr. Brulotte or Mr. Charvet that as of June 3rd, 1952 they were now licensed to use Patent No. 2,599,060, relating to a "Hop Picking Mechanism"?

A. I didn't inform them personally, no, but I did produce a picking bar—finger bars included in that patent and they were available to them if they were wanting a replacement, and every year there were some bars that were replaced and they were supplied as a replacement.

Mr. Countryman: They were supplied to any farmer who owned a hop picking machine and wished to purchase them?

A. That is right.

Mr. Countryman: Well, that would be dependent upon whether or not this particular farmer had a machine at the time you signed his contract?

A. That is right.

Mr. Countryman: And so Mr. Brulotte and Mr. Charvet had no additional privilege over any other owner or anyone who might be buying these picking machines, is that right?

Mr. Hutcheson: Well, are you referring to other owners of licensing contracts? I object to the question as ambiguous.

Mr. Countryman: Well, when you manufactured hop picking fingers through this patent, Mr. Thys, they were sent up to your agents or your dealers here in Yakima for sale, weren't they?

A. Yes.

Mr. Countryman: And they were offered for sale by Moxee City Warehouse and by Lindeman's at various times?

A. Yes.

[fol. 153] Mr. Countryman: And they were offered for sale to the public generally?

A. Well, they were offered for sale to only owners of portable hop picking machines they would fit.

Mr. Countryman: Only on those machines and they would fit in any Thys type portable hop picking machines?

A. Yes.

Mr. Countryman: Mr. Thys, as to any owner of a Thys type portable hop picking machine which may have been purchased in 1944, and was licensed in 1944, he could obtain these fingers and put them on the hop picking machine?

A. Yes.

. . . . . .

[fol. 154]

OFFERS IN EVIDENCE

The Court: Objection overruled. It will be admitted.

(Whereupon, said Letters Patent, No. 2,559,060, dated June 3, 1952, was received in evidence as Plaintiff's Exhibit No. 22, and is made a part of this Statement.)

• • • • • • •

By Mr. Hutcheson:

Q. Handing you Exhibit 22, the patent that has just been referred to, would you explain what features, if any, of this are included in these machines?

A. This is a finger bar which is a further development over the finger bar, Patent No. 2,448,063, which I don't think is an exhibit but which was declared invalid, and [fol. 155] the structure is different and it was manufactured after 1944 and offered for sale to the users of portable hop picking machines without additional royalty after that change.

Q. As counsel has mentioned here, parts for hop picking machines were for sale in the Moxee City Warehouse and also at Lindeman's here in Yakima?

A. That is correct.

Q. And that was by arrangement with you under your agreement, was it?

A. Yes. And they have been advised that parts would be available here through Lindeman and Moxee City Warehouse. The Moxee City Warehouse took over the obligations of Lindeman Power Equipment Company.

Q. Now, counsel asked you whether that was available to all portable hop picking machine users in this area. Were those machines covered by licensing agreements issued at one time or another of this same general nature?

A. I don't understand the question.

Q. Well, counsel asked you who could get the benefit of these subsequent patents, and you said that the hop picking machine owners in this area, and my question is were

license agreements of this general type issued to those hop picking machine owners in the State of Washington?

A. Yes.

Q. Let me see, you had finished as to this particular patent?

A. Yes. Now, there is a further patent—there is another patent that is pending.

[fol. 156] Q. Let me see, taking them in the order that the Clerk has marked them and numbered them here, showing you Identification No. 23, being Patent No. 2,448,063, issued to you personally on August 31st, 1948, do you identify that as that patent?

A. Yes. Yes.

The Court: We will have a short recess.

(Whereupon, after the usual morning recess, the following proceedings occurred:)

By Mr. Hutcheson:

Q. Showing you Identification 23, Mr. Thys, being a Patent No. 2,448,063, issued to you personally on August 31st, 1948, that is the original patent issued to you, is it?

A. Yes.

Q. And I will ask you whether or not the invention covered by that patent is or is not included in these machines?

A. It is.

Q. Would you describe just briefly the nature of the invention covered by that patent?

A. It is the assembly of the picking fingers—

Mr. Countryman: Your Honor, I object to him testifying to this unless this is offered for evidence.

Mr. Hutcheson: All right, we offer it at this time.

The Court: Was this pending at the time?

A. Yes.

Mr. Countryman: It wasn't pending at the time of the contract with Ray Charvet, which was in 1951 and the patent of 1948, and it wasn't included in the contract with Ray Charvet and wasn't pending at that time and it hadn't

[fol. 157] already been issued, and I want to raise the objection that I did to the last patent he offered, that it isn't within the scope of either of the licenses granted to either of these defendants.

The Court: It will be received.

Mr. Hutcheson: Well, we contend it is included within these other patents.

The Court: It will be admitted.

(Whereupon, said Letters Patent, No. 2448063, dated August 31st, 1948, was received in evidence as Plaintiff's Exhibit No. 23, and is a part of this Statement.)

Mr. Countryman: Your Honor, so that I may be clear in this, and so that the record may disclose it, is that patent issued only as to Ray Charvet and wife or as to Walter Brulotte and wife?

Mr. Hutcheson: Well, I submit that can be determined later. It is admissible in evidence, certainly.

The Court: Well, I will decide that point later but it will be admitted in evidence.

Mr. Hutcheson: Counselor—Mr. Countryman, I would like to withdraw Identification 27. I did the same thing as you did. I see it is a duplicate of 23.

Q. Now, showing you Exhibit 23, Mr. Thys, will you go ahead and state the nature of the invention covered by that patent, will you state that just briefly?

A. It covers the shape of the fingers and they—the way that they are assembled on an angle bar which is especially built to receive the fingers and secure them.

[fol. 158] Q. Showing you Identification 24, a patent issued to you personally on December 2nd, 1952 on application filed October 18, 1949, the patent number being 2,620,064, I will ask you whether that is the original patent issued to you under that number on that date?

A. Yes, it is.

Q. Well, you want your notes (getting notes). What would you say as to whether that patent is or is not incorporated in these machines?

A. No, it is not incorporated in these machines. It was more specifically designed for a stationary machine, but

then later modifications were made and it was adaptable to a portable machine.

Q. Showing you Identification 25, a patent issued to you personally, No. 2,647,626, issued on August 4th, 1953, applied for January 26th, 1951, just a few days before the Charvet contract, that is the original patent issued to you under that number, is it?

A. Yes, it is.

Q. And what would you say as to the invention covered by that patent?

A. That patent is especially designed to remove stems from hops after all other cleaning operations have been accomplished, it removes the stems and it is applicable to a portable machine and it was made available to the users of all of the portable hop picking machines.

• • • • • • •

[fol. 159] Q. What is that used for? Is it incorporated in the portable machine?

A. Yes, it is incorporated in the portable machine.

Q. Is it incorporated in the same machine or separate machines?

A. In the same machine.

Q. And bearing in mind that growers want cleanly picked hops devoid of leaves and stems so far as possible—by the way that is true, is it not?

A. Yes.

Q. What would you say as to the appropriateness of [fol. 160] these improvements in a machine of that nature?

A. It is an improvement—

Mr. Countryman: I object because it still hasn't been offered in evidence.

• • • • • • •

[fol. 161] (Whereupon, said Patent No. 2,647,626, dated August 4, 1953, was received in evidence as Plaintiff's Exhibit No. 25, and is made a part of this Statement.)

• • • • • • •

By Mr. Hutcheson:

Q. Let me see, I think I have asked you one question that counsel objected to that I would like to ask you again. What would you say as to the appropriateness of adding the invention covered by this patent, Exhibit 25, in these portable hop picking machines?

A. It produces cleaner hops by removing the last stems.

Q. And it is readily practicable to add these features to these machines, is it?

A. Yes.

Q. Now, showing you Identification 26, a patent granted to you on the 25th day of September, 1956, No. 2,764,163, I will ask you whether that is the original patent granted to you?

[fol. 162] A. Yes, sir, that is the original patent.

Q. And is that with reference to another improvement on portable hop picking machines?

Mr. Moore: Is that 26, Hutch?

A. Yes.

Mr. Hutcheson: Yes, 26. We offer it in evidence.

Mr. Countryman: Your Honor, this patent wasn't pending as to either contract. The application as revealed by the patent shows on January 27, 1953 and the patent wasn't issued until September 25, 1956, and so it clearly can't be within any construction of any of the contracts. It wasn't pending either in 1948 or 1951.

Mr. Hutcheson: I concede that but we are being accused of mis-use of the patent laws and so it is the subject of proper inquiry.

Mr. Countryman: Well, we are not complaining of any mis-use of these patents, surely, but only as to the contracts.

Mr. Hutcheson: Well, they complained of the licenses continuing into the 60's, and of course, one of the justifications for that is the additional patents that were issued.

Mr. Countryman: Well, in this case in the contract on Ray Charvet, then, the contract is due to expire on the completion of 1960 harvest, whereas it has been demonstrated in the evidence that the last patent in the contract expired in 1957 and we maintain the position that these other patents pending do not operate in theory or in fact to li-

cense either of these defendants in the use of these subsequent patents as contrasted with these rights which were [fol. 163] given to the general public.

Mr. Hutcheson: We have been accused of the mis-use of the patent laws.

The Court: I am not just sure what the parties are contending and I will withhold admission until later because if there is some contention that there is mis-use here it would be admissible but if not it would not be of any probative value.

* * * * * * *

[fol. 164] A. We felt that these other patents were related to hop picking machines and in order to protect the users of portable machines we had to secure a whole package of patents that could be construed as being infringed upon by the portable machines. That is one reason. Another reason is that very often the users decide to build [fol. 165] supplementary cleaners in the kiln, and therefore build a little home-made machine which could be construed as infringement on some of these patents. In order to guarantee them to be free from any patent infringement claims it is true that we have given them licenses to more patents than actually we believe that they need as being used in the portable machines. In fact, none of our users of portable hop picking machines have been sued for patent infringement. I think that covers the reasons for having these patents.

Q. Mr. Thys, in connection with these inventions, I will ask you whether or not there was a great deal of time involved in the research that went into the patents?

Mr. Countryman: That is completely immaterial. It doesn't matter whether he dreamed this up in one night or worked on it twenty years, and it is completely immaterial.

Mr. Hutcheson: Well, he objects to the charge of royalties.

Mr. Countryman: I am not objecting to charge of royalties in the abstract sense. It doesn't matter how long he worked on these machines.

The Court: I think it is immaterial, objection sustained.

Q. On the original purchase price of these machines was there anything included to cover your research expense that is involved in making these inventions that are covered by these patents?

Mr. Countryman: That is objected to as completely immaterial.

Mr. Hutcheson: It is the reason for the royalty payments [fol. 166] that they are objecting to, as I understand it.

Mr. Countryman: It is the contract, Your Honor, that we have got to construe by its corners.

The Court: Objection sustained. I think it is a question of whether the charges are legal, and if they are legal he can charge as much as the traffic will bear. I don't see why that would be material.

Mr. Hutcheson: Counsel is objecting to the seventeen year period under these original contracts and royalty contracts. Will you explain the reason for that?

A. Well, it was—

Mr. Countryman: Well, Your Honor, again, we have got to construe this contract whether it is legal or illegal and the subjective processes or purposes of Mr. Thys entering into a contract is not material. It is according to the law of the land.

Mr. Hutcheson: Well, we are being accused of willful mis-use of patents and—

Mr. Countryman: Well, subjective intentions are not a matter of concern in the violation of the law.

Mr. Hutcheson: That is your expression, I didn't say anything about subjective.

The Court: Objection overruled.

A. It is to finance the machines. If all the development work was assessed to the few machines sold, and the expectation was not to sell very many, it would be prohibitive and therefore the method was used so that the machine essentially would be paid for out of savings and after the first two years or so we found that the royalty was higher than was needed to assure the repayment of the develop- [fol. 167] ment work and that the prospects were good, and

so we reduced the royalty. We could have possibly reduced the term and the length of the royalty payments and maintain the same amount of royalty or reduce the royalties and keep the same time, and that is what we elected to do, and we thought it was in the best interests of the users.

Q. The royalty originally was $5.00 per bale?

A. Yes, sir.

Q. That is what you testified yesterday?

A. Yes.

Q. From a practical business standpoint were the hop growers financially in a position when they bought the machines originally to pay the full cost of the machines and the full research and development expense there that you incurred?

A. Yes.

Mr. Countryman: Your Honor, this witness has no testimonial knowledge of the financial ability of something in excess of 200 farmers. He has got to have some testimonial knowledge of these facts if he is going to testify.

Mr. Hutcheson: He dealt with them and he should know. place, that would be hearsay.
can charge as much as the traffic will bear. I don't see why

The Court: He has shown no knowledge so far as checking their financial condition.

Q. As you testified yesterday, Mr. Thys, were there a number of instances where for financial reasons hop picking licensees or hop growers requested extensions of time in which to make royalty payments; in other words, to [fol. 168] waive payment this particular year and have it added on another year at the end of the contract term?

A. Yes.

Q. Have there been quite a number of instances where the growers requested that of you?

A. Yes.

Q. And you have consented to that where it appeared appropriate under the circumstances, have you?

A. Yes.

Q. Where there is a transfer agreement, a sale of the machine from one user to another, and a three-party contract, as there was here, there is a total of seventeen years altogether, is there, for the first user plus the second user?

A. Yes, sir.

Q. And added together it makes the seventeen years?

A. Yes.

Q. Have you ever terminated any of these licenses—well, with reference to these two contracts involved here, Brulotte and Charvet contracts, have you terminated them on account of the non-payment of royalty?

A. No.

Q. Has there been any interference whatever on your part with the continued use of the machines by the defendants?

A. No.

Q. And is that true generally as to the licensed hop picking machine users, have you interfered with the continued use by any of those users?

A. No.

Q. Now, the payment on royalties, have you ever in prac-
[fol. 169] tice imposed any restriction whatever upon the use of the machines by the purchasers of the machines?

A. No restriction except they are supposed to be used for what they were designed for, that is, picking hops.

Q. Other than that, have you interfered with the manner of their use in any respect?

A. No, sir.

• • • • • • •

Cross examination.

By Mr. Countryman:

• • • • • • •

[fol. 170] Q. But I believe you testified yesterday that there was considerable modification by the Lindeman Company and other dealers during this period?

A. Well, I didn't say "considerable". Certainly, I can't police all of the machines to see that they didn't make any modifications.

• • • • • • •

[fol. 171] Q. Mr. Thys, handing you Plaintiff's Identifications 22, 24, and 25 and 26—

Mr. Hutcheson: Well, they are exhibits, aren't they?

Mr. Countryman: Pardon?

Mr. Hutcheson: They are exhibits rather than identifications.

Mr. Countryman: Or exhibits, pardon me.

Q. Do you have any personal knowledge yourself that any of those devices were ever in fact incorporated in either the machine of Walter Brulotte or the machine of Ray Charvet?

A. I don't know. I assume that they were. At least this Patent 2,599,080, Exhibit 22, was.

Q. You assume that they were but you don't have any actual knowledge yourself?

A. I have no actual knowledge, but this design, the finger bars, which were covered by the Patent under Exhibit 22, were pretty well worn out and would have been replaced by this time.

[fol. 172] Q. Well, of course, the finger bars don't wear out unless the machine is used, is that right?

A. That's right.

Q. And so you have no way of knowing whether the finger bars were incorporated into either the machine of Walter Brulotte or of Ray Charvet?

A. No.

Q. Now, Mr. Thys, Patent No. 2,448,063, Exhibit 23, this was the one we just mentioned that was declared invalid?

A. Yes.

Q. It is also true, isn't it, Mr. Thys, that you have no personal knowledge whether Mr. Brulotte or Mr. Charvet incorporated any of the principles of that patent into their machines?

A. Of course, it is rather difficult for me to testify because all of my records have been burned in the fire, but I am pretty sure that that wasn't incorporated in the machine when they were building it.

Q. But you have no personal knowledge of what finger bars were actually on the machines of Mr. Brulotte and Mr. Charvet?

A. I don't know what finger bars were on the machines but I assumed that there were some of the new finger bars on those machines.

Q. You assumed that?

A. Yes, if they were acquired by Mr. Brulotte in 1948 and in 1951 when acquired by Mr. Charvet.

Q. And so in all fairness, Mr. Thys, you are just assuming that but you have no actual knowledge of what was on those machines?

[fol. 173] A. That is true but I have an actual knowledge that they were available to them.

Q. They could have been incorporated, doesn't it amount to that?

A. They could have been incorporated and they probably were.

Q. You assume that they probably were, is that right?

A. Yes.

Mr. Countryman: No further questions.

Redirect examination.

By Mr. Hutcheson:

Q. Mr. Thys, did you ever have any intention to violate any of the anti trust laws or patent laws so far as you were aware?

Mr. Countryman: Oh, this is the wrong time to inquire as to this, Your Honor. We can't go back and forth and back and forth all day on this witness. He can ask any questions on matters I covered and he wishes to cover but it is outside of the scope of my cross examination; and not only that, I am sure that the case authorities and all of the law under the anti trust laws is quite aside from any intentions that a particular person might have. He is required to comply with the law and if he fails to comply, he fails at his peril, even though he may have good intentions but it is clearly immaterial.

The Court: Objection sustained.

Mr. Hutcheson: That is all.

* * * * * * *

[fol. 176]

PLAINTIFF'S EXHIBIT No. 1

(See opposite) ☞

Form A-2

AGREEMENT

THIS AGREEMENT, Made this [illegible] day of [illegible], 19[illegible], by and between THYS COMPANY, a Corporation, hereinafter referred to as First Party, and [illegible], of [illegible], hereinafter referred to as Second Party and [illegible], of [illegible], hereinafter referred to as Third Party,

WITNESSETH:

WHEREAS, First Party is the licensee of E. Clemens Horst Co., a New Jersey Corporation, of San Francisco, California, under certain United States Letters Patent relating to the art of hop picking and separating machines of both portable and stationary types, hereinafter referred to as hop picking machines or as machines, and under certain United States Letters Patent for improved methods of maintenance of said machines; and

WHEREAS, First Party is willing to license Second Party to use said machines and to practice the methods and processes disclosed and claimed in the Letter Patent hereinafter listed and related thereto, but upon the terms and conditions hereinafter set forth; and

WHEREAS, Second Party is willing to buy certain of said machines from Third Party and to be licensed by First Party to use said machines and to practice the methods and processes disclosed and claimed in the letters Patent hereinafter listed and related thereto, and upon the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the purchase price specified in Paragraph 2 hereof to be paid by Second Party to Third Party, and in consideration of the covenants and agreements herein contained, and for other good, adequate and valuable consideration between the parties moving,

IT IS AGREED as follows:

1. Third Party hereby sells to Second Party and Second Party buys from Third Party, [illegible] ([illegible]) Portable Hop Picking machine(s) identified by First Party's serial number(s) as follows: [illegible]

said machine(s) to be delivered by Third Party to Second Party on or before [illegible], 19[illegible].

2. Second Party hereby pays to Third Party as purchase price of said machine(s) the sum of Sixty two hundred and no/100 dollars ($ 6,200.00) and Third Party acknowledges receipt of said sum of Sixty two hundred and no/100 dollars ($ 6,200.00).

3. Second Party shall pay to the order of Third Party, on delivery of said machine(s), in addition to the final installment of the purchase price, the sum of all sales, excise or other taxes levied on the manufacture, sale, delivery and licensing of said machine(s).

4. Second Party shall execute and deliver to First Party to secure the payment of royalty as provided in Paragraph 8 hereof a chattel mortgage in substantially the form submitted herewith as Exhibit "A" or, in lieu thereof, such other security as First Party shall accept. First Party shall not unreasonably decline to accept such other security if, in the fair and reasonable judgment of First Party, such other security adequately and fully secures the payment of reasonably anticipated royalty payable as provided in Paragraph 8. Chattel mortgage or other acceptable security as above to be given annually by Second Party when requested by First Party. Provisions of this paragraph 4, shall be enforced only in the event that Second Party has defaulted in his obligations under the present agreement.

5. Title to said machine(s) shall vest in Second Party on delivery of said machine(s) to Second Party by Third Party, but the vesting of title to said machine(s) in Second Party shall not license Second Party to use said machine(s) and to practice the methods and processes disclosed and claimed in Letters Patent hereinafter listed and related thereto.

6. It is expressly understood that the sale and/or delivery of said machine(s) is without the right to use said machine(s) and/or the methods and processes disclosed and claimed in the Letters Patent listed hereinafter, and that the right to use said machine(s) and/or said methods and processes Second Party must secure from First Party a license to use said machine(s) and/or said methods and processes, and that the continuing right to use said machine(s) and/or said methods and processes is strictly conditioned upon the full and faithful performance of such license;

WHEREFORE, First Party hereby grants to Second Party a non-exclusive, indivisible and non-transferable license, as long as the terms hereof be fully and faithfully performed and maintained, to use said machine(s), for the purpose of which said machine(s) was/were designed and said methods and processes as disclosed in the following Letters Patent:

U. S. Patent Number	Date of Issue	Invention
2,114,712	April 19, 1938	Method of Keeping the Fingers of Hop Picking Machines Clean
2,114,727	April 19, 1938	Hop Picking Machine
2,116,006	May 3, 1938	Hop and Stem Separator
2,138,529	November 20, 1938	Hop Separator
2,139,029	December 6, 1938	Hop Picking Machine
2,139,046	December 6, 1938	Hop Separator
2,187,526	January 16, 1940	Hop Picking Machine
2,191,183	February 20, 1940	Finger Structure and Supporting Bar for Hop Picking Machine
2,193,354	March 12, 1940	Vine Grasper Bar
2,211,357	August 13, 1940	Hop Picking Machine
2,226,009	December 24, 1940	Hop Separator

1. Third Party hereby sells to Second Party and Second Party buys from Third Party, (--2--) Portable Hop Picking machine(s) identified by First Party's serial number(s) as follows:

said machine(s) to be delivered by Third Party to Second Party on or before , 19 .

2. Second Party hereby pays to Third Party as purchase price of said machine(s) the sum of Sixty two hundred and no/100 dollars ($ 6,200.00) and Third Party acknowledges receipt of said sum of Sixty two hundred and no/100 dollars ($ 6,200.00).

3. Second Party shall pay to the order of Third Party, on delivery of said machine(s), in addition to the final installment of the purchase price, the sum of all sales, excise or other taxes levied on the manufacture, sale, delivery and licensing of said machine(s).

4. Second Party shall execute and deliver to First Party to secure the payment of royalty as provided in Paragraph 8 hereof a chattel mortgage in substantially the form submitted herewith as Exhibit "A" or, in lieu thereof, such other security as First Party shall accept. First Party shall not unreasonably decline to accept such other security if in the fair and reasonable judgment of First Party, such other security adequately and fully secures the payment of reasonably anticipated royalty payable as provided in Paragraph 8. Chattel mortgage or other acceptable security as above to be given promptly by Second Party when requested by First Party. Provisions of this paragraph 4, shall be enforced only in the event that Second Party has defaulted in his obligations under the present agreement.

5. Title to said machine(s) shall vest in Second Party on delivery of said machine(s) to Second Party by Third Party, but the vesting of title to said machine(s) in Second Party shall not license Second Party to use said machine(s) and to practice the methods and processes disclosed and claimed in Letters Patent hereinafter listed and related thereto.

6. It is expressly understood that the sale and/or delivery of said machine(s) is without the right to use said machine(s) and/or the methods and processes disclosed and claimed in the Letters Patent listed hereinafter, and that in order to use said machine(s) and or said methods and processes Second Party must secure from First Party a license to use said machine(s) and/or said methods and processes, and that the continuing right to use said machine(s) and/or said methods and processes is strictly conditioned upon the full and faithful performance of such license;

WHEREFORE, First Party hereby grants to Second Party a non-exclusive, indivisible and non-transferable license, as long as the terms hereof be fully and faithfully performed and maintained, to use said machine(s), for the purpose of which said machine(s) was/were designed and said methods and processes as disclosed in the following Letters Patent:

U. S. Patent Number	Date of Issue	Invention
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2,139,029	December 6, 1938	Hop Picking Machine
2,139,046	December 6, 1938	Hop Separator
2,187,526	January 16, 1940	Hop Picking Machine
2,191,183	February 20, 1940	Finger Structure and Supporting Bar for Hop Picking Machine
2,193,354	March 12, 1940	Vine Grasper Bar
2,211,357	August 13, 1940	Hop Picking Machine
2,226,009	December 24, 1940	Hop Separator
2,336,280	December 7, 1943	Hop Cluster Stemmer

Other Patents Pending.

7. The term of the license granted to Second Party by First Party, as provided in Paragraph 6 hereof, shall be from date first above written until completion of this [illegible] irrespective of the date of expiration of any of the Letters Patent hereinbefore listed.

8. For and in consideration of the license, set forth in Paragraph 6 hereinabove, Second Party agrees to pay to First Party a royalty of Three Dollars and Thirty-Three and One-Third Cents ($3.33-1/3) per two hundred (200) pounds of dried hops harvested by machines purchased by Second Party, said royalty being payable when the amount of bales picked is determined on or before the 15th day of October of each year during the term hereof, for all hops harvested during the preceding twelve (12) calendar months. In any event the minimum royalty payable hereunder shall be Five Hundred Dollars ($500) per machine per annum, and if the royalties computed at the rate of Three Dollars and Thirty-Three and One-Third Cents ($3.33-1/3) per two hundred (200) pounds of hops harvested shall not aggregate as much as Five Hundred Dollars ($500) for each machine in each period of twelve (12) calendar months herein referred to, said sum of Five Hundred Dollars ($500) per machine shall nevertheless be paid to First Party by the following October 15th and any royalties paid on any machine in excess of Five Hundred Dollars ($500) per annum shall not apply against or reduce the minimum royalties payable on other machines; provided, that if it shall be impossible, in the fair and reasonable judgment of Party of the First Part to use any such machine during any part of a particular picking season because of a serious breakdown or breakdowns of such machine, occurring notwithstanding the exercise of reasonable care on the part of the user or users thereof, an equitable adjustment shall be made of the amount of minimum royalty payable on such machines for such picking season, based upon the number of days during which such machine cannot be used bears to the total number of days in the normal picking season. Second Party agrees that any royalties payable by Second Party may be collected from any source or through any company by the giving of orders to pay if this method is desired by First Party.

9. Second Party will deliver to First Party on or before October 15th of each year during the term hereof, statements in such reasonable details as First Party may request, showing the amount of royalties payable on each machine licensed hereunder and the manner in which such amount was computed. First Party and its agents shall have free access at all times to said machine(s) wherever situated or operated for the purpose of inspecting and observing the operation thereof and determining the amount of hops harvested thereby, and First Party and its agents shall have the right to examine the records of Second Party insofar as may be necessary for the purpose of determining the amount of royalty property payable hereunder. Second Party shall make and preserve proper records showing the amount of hops harvested by means of each of such machine(s).

[fol. 177]

(See opposite) ☞

10. Second Party will use coir yarn or other twine satisfactory to First Party in the operation of said machine(s), but in any event the royalties provided in Paragraph 8 hereof shall be payable whether or not coir yarn be used and whether or not the methods and processes disclosed and claimed in said Patent No. 2,114,712 be made use of.

11. Second Party concedes the validity of all Letters Patent licensed herein, and further agrees that it will not contest, directly or indirectly, the validity of any herein licensed patent, so long as this agreement remains in full force and effect.

12. First Party agrees to furnish at Sacramento, California, the place of manufacture of said machines, or at such other place at which said machines may hereafter be manufactured, if First Party shall at the time have the same in stock, such replacement parts as may be necessary for making repairs to said machines, and Second Party shall pay or cause to be paid for all such replacement parts furnished by First Party a reasonable price together with all transportation charges and expenses of installation.

13. Second Party shall keep said machine(s) in a good state of repair and shall promptly renew and replace all broken or worn-out parts.

14. Second Party shall pay, prior to delinquency, all taxes on said machine(s) and shall maintain or cause to be maintained Insurance against loss of or damage to said machine(s) by fire, theft and collision in amounts equal to their full insurable value in insurance companies and under policies satisfactory to First Party, and shall, from time to time, give to First Party such information as First Party may reasonably request concerning such insurance and the payment of premiums thereon.

15. In case of any default in the performance of the covenants contained in Paragraphs 12, 13 and 14 hereof, First Party may perform the same and advance all sums necessary for that purpose, repayment of which shall be secured by the chattel mortgages referred in to Paragraph 4 hereof, but such action on the part of the First Party shall not relieve Second Party from the consequences of any such default.

16. Second Party shall keep or cause to be kept on said machines in plain view at all times any and all plates and stencils or other markings placed thereon by First Party.

17. First Party shall not be liable for any loss of or damage to said machine(s) nor for any injury to persons or damage to property resulting in any manner from the use or operation thereof, and Second Party shall hold First Party harmless from any claim of any kind referred to in this paragraph.

18. It is agreed that no representations or warranties, express or implied, are or have been made by First Party or any of its agents concerning said machine(s) or the use or operation thereof.

19. First Party shall be under no liability or obligation for any failure or delay in the performance of any terms, covenants or conditions of this agreement on its part to be performed if such failure or delay shall result, in whole or in part, from fire, strike, riot, interruption of the usual means of transportation, failure of First Party's sources of supply or materials, war, act of God, or other elements, or any other cause beyond the control of First Party whether similar or dissimilar to those hereinbefore specified.

20. Second Party shall not assign this agreement nor any interest therein, and shall not permit said machine(s) to become subject to any lien or encumbrance other than the liens for current taxes, nor permit said machine(s) to be removed from Yakima County, State of Washington, nor permit said machine(s) to be seized or levied upon by process of law, without the prior written consent of First Party. First Party shall not unreasonably withhold such consent.

21. This agreement or any extension or continuation shall inure to the benefit of and shall be binding upon the successors, heirs, executors, administrators and assigns of the parties hereto, subject, however, to the provisions of Paragraph 20 hereof.

22. No waiver of or failure to enforce any of the provisions of this agreement nor any extension of time or partial payment of any amount due hereunder before or after delinquency shall operate to extend the time on the payment of the balance of such amount nor be considered as a waiver of the strict performance of this agreement on all subsequent payments and in every other particular.

23. The venue of any action commenced by First Party to enforce the provisions of this agreement or of any chattel mortgage given pursuant hereto may, at the option of First Party, be laid in Yakima County, or Sacramento County, California, and in addition to taxable costs as provided by law, First Party shall be entitled to recover a reasonable sum as attorney's fees in such action.

24. Time is of the essence of this agreement, and each and every provision thereof except as expressly otherwise herein provided.

25. Upon prompt payment in full of Royalties due hereunder within time prescribed in Paragraph 8 above, and provided Second Party is not in default in its faithful performance of this agreement and of all its covenants, First Party will allow a discount of 10% of such Royalty; but this provision shall not operate to reduce the minimum Royalty required of Second Party as provided in said Paragraph 8.

26. All remedies herein provided for are cumulative and not exclusive of any other remedies provided herein or by law.

27. The terms of this instrument comprise the entire agreement between the parties hereto, and no variation from the same shall be valid unless made in writing between said parties.

28. Any notice, report or other communication required or permitted to be given the First Party hereunder shall be given in writing by United States registered mail addressed to First Party at 6900 Folsom Boulevard, Sacramento, California, or such other address as First Party may designate by notice in writing to Second Party, and any such notice, report or other communication required or permitted to be given to Second Party may be mailed to Second Party in the same manner at Yakima, Washington or such other address as may be designated in writing by Second Party to First Party.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate the day and year first above written.

THYS COMPANY

First Party

Second Party

Third Party

STATE OF WASHINGTON }
County of Yakima } ss.

On this 12th day of August, 19 52, personally appeared before me Walter Brulotte and Herke Bros. by J. P. Herke to me known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that they signed and sealed same as their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal this 12th day of August, 19 52.

Notary Public for the State of Washington residing at Yakima.

10. Second Party will use coir yarn or other twine satisfactory to First Party in the operation of said machine(s), but in any event the royalties provided in Paragraph 8 hereof shall be payable whether or not coir yarn be used and whether or not the methods and processes disclosed and claimed in said Patent No. 2,114,712 be made use of.

11. Second Party concedes the validity of all Letters Patent licensed herein, and further agrees that it will not contest, directly or indirectly, the validity of any herein licensed patent, so long as this agreement remains in full force and effect.

12. First Party agrees to furnish at Sacramento, California, the place of manufacture of said machines, or at such other place at which said machines may hereafter be manufactured, if First Party shall at the time have the same in stock, such replacement parts as may be necessary for making repairs to said machines, and Second Party shall pay or cause to be paid for all such replacement parts furnished by First Party a reasonable price together with all transportation charges and expenses of installation.

13. Second Party shall keep said machine(s) in a good state of repair and shall promptly renew and replace all broken or worn-out parts.

14. Second Party shall pay, prior to delinquency, all taxes on said machine(s) and shall maintain or cause to be maintained Insurance against loss of or damage to said machine(s) by fire, theft and collision in amounts equal to their full insurable value in insurance companies and under policies satisfactory to First Party, and shall, from time to time, give to First Party such information as First Party may reasonably request concerning such insurance and the payment of premiums thereon.

15. In case of any default in the performance of the covenants contained in Paragraphs 12, 13 and 14 hereof, First Party may perform the same and advance all sums necessary for that purpose, repayment of which shall be secured by the chattel mortgages referred to in Paragraph 4 hereof, but such action on the part of First Party shall not relieve Second Party from the consequences of any such default.

16. Second Party shall keep or cause to be kept on said machines in plain view at all times any and all plates and stencils or other markings placed thereon by First Party.

17. First Party shall not be liable for any loss of or damage to said machine(s) nor for any injury to persons or damage to property resulting in any manner from the use or operation thereof, and Second Party shall hold First Party harmless from any claim of any kind referred to in this paragraph.

18. It is agreed that no representations or warranties, express or implied, are or have been made by First Party or any of its agents concerning said machine(s) or the use or operation thereof.

19. First Party shall be under no liability or obligation for any failure or delay in the performance of any terms, covenants or conditions of this agreement on its part to be performed if such failure or delay shall result, in whole or in part, from fire, strike, riot, interruption of the usual means of transportation, failure of First Party's sources of supply or materials, war, act of God, or other elements, or any other cause beyond the control of First Party whether similar or dissimilar to those hereinbefore specified.

20. Second Party shall not assign this agreement nor any interest therein, and shall not permit said machine(s) to become subject to any lien or encumbrance other than the liens for current taxes, nor permit said machine(s) to be removed from Yakima County, State of Washington, nor permit said machine(s) to be seized or levied upon by process of law, without the prior written consent of First Party. First Party shall not unreasonably withhold such consent.

21. This agreement or any extension or continuation shall inure to the benefit of and shall be binding upon the successors, heirs, executors, administrators and assigns of the parties hereto, subject, however, to the provisions of Paragraph 20 hereof.

22. No waiver of or failure to enforce any of the provisions of this agreement nor any extension of time or partial payment of any amount due hereunder before or after delinquency shall operate to extend the time on the payment of the balance of such amount nor be considered as a waiver of the strict performance of this agreement on all subsequent payments and in every other particular.

23. The venue of any action commenced by First Party to enforce the provisions of this agreement or of any chattel mortgage given pursuant hereto may, at the option of First Party, be laid in Yakima County, or Sacramento County, California, and in addition to taxable costs as provided by law, First Party shall be entitled to recover a reasonable sum as attorney's fees in such action.

24. Time is of the essence of this agreement, and each and every provision thereof except as expressly otherwise herein provided.

25. Upon prompt payment in full of Royalties due hereunder within time prescribed in Paragraph 8 above and provided Second Party is not in default in its faithful performance of this agreement and of all its covenants, First Party will allow a discount of 10% of such Royalty; but this provision shall not operate to reduce the minimum Royalty required of Second Party as provided in said Paragraph 8.

26. All remedies herein provided for are cumulative and not exclusive of any other remedies provided herein or by law.

27. The terms of this instrument comprise the entire agreement between the parties hereto, and no variation from the same shall be valid unless made in writing between said parties.

28. Any notice, report or other communication required or permitted to be given the First Party hereunder shall be given in writing by United States registered mail addressed to First Party at 6900 Folsom Boulevard, Sacramento, California, or such other address as First Party may designate by notice in writing to Second Party, and any such notice, report or other communication required or permitted to be given to Second Party may be mailed to Second Party in the same manner at Yakima, Washington (Route 5, Yakima) or such other address as may be designated in writing by Second Party to First Party.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate the day and year first above written.

THYS COMPANY

First Party

Second Party

Walter Brulotte

Third Party

STATE OF WASHINGTON }
County of Yakima } ss.

On this 12th day of August, 19 52, personally appeared before me Walter Brulotte and Herke Bros. by J. P. Herke to me known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that they signed and sealed same as their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal this 12th day of August, 19 52.

Notary Public for the State of Washington residing at Yakima.

[illegible] miums thereon.

15. In case of any default in the performance of the covenants contained in Paragraphs 12, 13 and 14 hereof, First Party may perform the same and advance all sums necessary for that purpose, repayment of which shall be secured by the chattel mortgages referred in to Paragraph 4 hereof, but such action on the part of the First Party shall not relieve Second Party from the consequences of any such default.

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17. First Party shall not be liable for any loss of or damage to said machine(s) nor for any injury to persons or damage to property resulting in any manner from the use or operation thereof, and Second Party shall hold First Party harmless from any claim of any kind referred to in this paragraph.

18. It is agreed that no representations or warranties, express or implied, are or have been made by First Party or any of its agents concerning said machine(s) or the use or operation thereof.

19. First Party shall be under no liability or obligation for any failure or delay in the performance of any terms, covenants or conditions of this agreement on its part to be performed if such failure or delay shall result, in whole or in part, from fire, strike, riot, interruption of the usual means of transportation, failure of First Party's sources of supply or materials, war, act of God, or other elements, or any other cause beyond the control of First Party whether similar or dissimilar to those hereinbefore specified.

20. Second Party shall not assign this agreement nor any interest therein, and shall not permit said machine(s) to become subject to any lien or encumbrance other than the liens for current taxes, nor permit said machine(s) to be removed from Yakima County, State of Washington, nor permit said machine(s) to be seized or levied upon by process of law, without the prior written consent of First Party. First Party shall not unreasonably withhold such consent.

21. This agreement or any extension or continuation shall inure to the benefit of and shall be binding upon the successors, heirs, executors, administrators and assigns of the parties hereto, subject, however, to the provisions of Paragraph 20 hereof.

22. No waiver of or failure to enforce any of the provisions of this agreement nor any extension of time or partial payment of any amount due hereunder before or after delinquency shall operate to extend the time on the payment of the balance of such amount nor be considered as a waiver of the strict performance of this agreement on all subsequent payments and in every other particular.

23. The venue of any action commenced by First Party to enforce the provisions of this agreement or of any chattel mortgage given pursuant hereto may, at the option of First Party, be laid in Yakima County, or Sacramento County, California, and in addition to taxable costs as provided by law, First Party shall be entitled to recover a reasonable sum as attorney's fees in such action.

24. Time is of the essence of this agreement, and each and every provision thereof except as expressly otherwise herein provided.

25. Upon prompt payment in full of Royalties due hereunder within time prescribed in Paragraph 8 above and provided Second Party is not in default in its faithful performance of this agreement and of all its covenants, First Party will allow a discount of 10% of such Royalty; but this provision shall not operate to reduce the minimum Royalty required of Second Party as provided in said Paragraph 8.

26. All remedies herein provided for are cumulative and not exclusive of any other remedies provided herein or by law.

27. The terms of this instrument comprise the entire agreement between the parties hereto, and no variation from the same shall be valid unless made in writing between said parties.

28. Any notice, report or other communication required or permitted to be given the First Party hereunder shall be given in writing by United States registered mail addressed to First Party at 6900 Folsom Boulevard, Sacramento, California, or such other address as First Party may designate by notice in writing to Second Party, and any such notice, report or other communication required or permitted to be given to Second Party may be mailed to Second Party in the same manner at Moxee, Washington or such other address as may be designated in writing by Second Party to First Party.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate the day and year first above written.

Toys Company
by: [signature]
First Party

[illegible] COMPANY
[signature]
Second Party

Yakima Chief [illegible]
by: [signature] [illegible]
Third Party

STATE OF Washington
County of Yakima } ss

On this ______ day of August, 19[illegible], personally appeared before me Walker Brulotte, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he signed and sealed same as his free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal this 4 day of August, 19[illegible].

[signature]

Notary Public for the State of ______

residing at ______

[fol. 178]

(See opposite) ☞

Form A-2

AGREEMENT

THIS AGREEMENT, made this 12th day of [illegible], 1952, by and between THYS COMPANY, a Corporation, hereinafter referred to as First Party, and HERKE BROS., of [illegible], WASHINGTON (Route 5, Yakim hereinafter referred to as Second Party and [illegible] of [illegible], WASHINGTON, hereinafter referred to as Third Party,

WITNESSETH:

WHEREAS, First Party is the licensee of E. Clemens Horst Co., a New Jersey Corporation, of San Francisco, California, under certain United States Letters Patent relating to the art of hop picking and separating machines of both portable and stationary types, hereinafter referred to as hop picking machines or as machines, and under certain United States Letters Patent for improved methods of maintenance of said machines; and

WHEREAS, First Party is willing to license Second Party to use said machines and to practice the methods and processes disclosed and claimed in the Letters Patent hereinafter listed and related thereto, but upon the terms and conditions hereinafter set forth; and

WHEREAS, Second Party is willing to buy certain of said machines from Third Party and to be licensed by First Party to use said machines and to practice the methods and processes disclosed and claimed in the letters Patent hereinafter listed and related thereto, and upon the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the purchase price specified in Paragraph 2 hereof to be paid by Second Party to Third Party, and in consideration of the covenants and agreements herein contained, and for other good, adequate and valuable consideration between the parties moving,

IT IS AGREED as follows:

1. Third Party hereby sells to Second Party and Second Party buys from Third Party, One (1) Portable Hop Picking machine (s) identified by First Party's serial number(s) as follows: [illegible]

said machine(s) to be delivered by Third Party to Second Party on or before August [illegible], 1952.

2. Second Party hereby pays to Third Party as purchase price of said machine(s) the sum of Two Thousand Nine Hundred and no/100 dollars ($2,900.00) and Third Party acknowledges receipt of said sum of [illegible] dollars ($[illegible]).

3. Second Party shall pay to the order of Third Party, on delivery of said machine(s), in addition to the final installment of the purchase price, the sum of all sales, excise or other taxes levied on the manufacture, sale, delivery and licensing of said machine(s).

4. Second Party shall execute and deliver to First Party to secure the payment of royalty as provided in Paragraph 8 hereof a chattel mortgage in substantially the form submitted herewith as Exhibit "A" or, in lieu thereof, such other security as First Party shall accept. First Party shall not unreasonably decline to accept such other security if, in the fair and reasonable judgment of First Party, such other security adequately and fully secures the payment of reasonably anticipated royalty payable as provided in Paragraph 8. Chattel mortgage or other acceptable security as above to be given annually by Second Party when requested by First Party. Provisions of this paragraph 4, shall be enforced only in the event that Second Party has defaulted in his obligations under the present agreement.

5. Title to said machine(s) shall vest in Second Party on delivery of said machine(s) to Second Party by Third Party, but the vesting of title to said machine(s) in Second Party shall not license Second Party to use said machine(s) and to practice the methods and processes disclosed and claimed in Letters Patent hereinafter listed and related thereto.

6. It is expressly understood that the sale and/or delivery of said machine(s) is without the right to use said machine(s) and/or the methods and processes disclosed and claimed in the Letters Patent listed hereinafter, and that in order to use said machine(s) and/or said methods and processes Second Party must secure from First Party a license to use said machine(s) and/or said methods and processes, and that the continuing right to use said machine(s) and/or said methods and processes is strictly conditioned upon the full and faithful performance of such license;

WHEREFORE, First Party hereby grants to Second Party a non-exclusive, indivisible and non-transferable license, as long as the terms hereof be fully and faithfully performed and maintained, to use said machine(s), for the purpose for which said machine(s) was/were designed and said methods and processes as disclosed in the following Letters Patent:

LICENSE REQ'D

CONDITIONAL

LIMITATION

U. S. Patent Number	Date of Issue	Invention
2,114,712	April 19, 1938	Method of Keeping the Fingers of Hop Picking Machines Clean
2,114,727	April 19, 1938	Hop Picking Machine
2,116,006	May 3, 1938	Hop and Stem Separator
2,138,529	November 29, 1938	Hop Separator
2,139,029	December 6, 1938	Hop Picking Machine
2,139,046	December 6, 1938	Hop Separator
2,187,526	January 16, 1940	Hop Picking Machine
2,191,183	February 20, 1940	Finger Structure and Supporting Bar for Hop Picking Machine

(1) Portable Hop Picking machine(s) identified by First Party's serial number(s) as follows:

44-L-138

said machine(s) to be delivered by Third Party to Second Party on or before January 31, 19[illegible]

2. Second Party hereby pays to Third Party as purchase price of said machine(s) the sum of Thirty-Three Hundred - - - - - - - - - - - - dollars ($3300.00) and Third Party acknowledges receipt of said sum of Thirty Three Hundred - - - dollars ($3300.00).

3. Second Party shall pay to the order of Third Party, on delivery of said machine(s), in addition to the final installment of the purchase price, the sum of all sales, excise or other taxes levied on the manufacture, sale, delivery and licensing of said machine(s).

4. Second Party shall execute and deliver to First Party to secure the payment of royalty as provided in Paragraph 8 hereof a chattel mortgage in substantially the form submitted herewith as Exhibit "A" or, in lieu thereof, such other security as First Party shall accept. First Party shall not unreasonably decline to accept such other security if, in the fair and reasonable judgment of First Party, such other security adequately and fully secures the payment of reasonably anticipated royalty payable as provided in Paragraph 8. Chattel mortgage or other acceptable security as above to be given annually by Second Party when requested by First Party. Provisions of this paragraph 4, shall be enforced only in the event that Second Party has defaulted in his obligations under the present agreement.

5. Title to said machine(s) shall vest in Second Party on delivery of said machine(s) to Second Party by Third Party, but the vesting of title to said machine(s) in Second Party shall not license Second Party to use said machine(s) and to practice the methods and processes disclosed and claimed in Letters Patent hereinafter listed and related thereto.

6. It is expressly understood that the sale and/or delivery of said machine(s) is without the right to use said machine(s) and/or the methods and processes disclosed and claimed in the Letters Patent listed hereinafter, and that in order to use said machine(s) and/or said methods and processes Second Party must secure from First Party a license to use said machine(s) and/or said methods and processes, and that the continuing right to use said machine(s) and/or said methods and processes is strictly conditioned upon the full and faithful performance of such license;

WHEREFORE, First Party hereby grants to Second Party a non-exclusive, indivisible and non-transferable license, as long as the terms hereof be fully and faithfully performed and maintained, to use said machine(s), for the purpose of which said machine(s) was/were designed and said methods and processes as disclosed in the following Letters Patent:

U. S. Patent Number	Date of Issue	Invention
[illegible]	April 19, 1938	Method of Keeping the Fingers of Hop Picking Machines Clean
2,114,727	April 19, 1938	Hop Picking Machine
2,116,006	May 3, 1938	Hop and Stem Separator
[illegible]	November 29, 1938	Hop Separator
[illegible]	December 6, 1938	Hop Picking Machine
[illegible]	December 6, 1938	Hop Separator
2,187,526	January 16, 1940	Hop Picking Machine
2,191,183	February 20, 1940	Finger Structure and Supporting Bar for Hop Picking Machine
2,193,364	March 12, 1940	Vine Grasper Bar
2,211,257	August 13, 1940	Hop Picking Machine
[illegible]	December 24, 1940	Hop Separator
[illegible]	December 7, 1943	Hop Cluster Stemmer

Other Patents Pending.

7. The term of the license granted to Second Party by First Party, as provided in Paragraph 6 hereof, shall be from date first above written until the completion of the 1960 harvest irrespective of the date of expiration of any of the Letters Patent hereinbefore listed.

8. For and in consideration of the license, set forth in Paragraph 6 hereinabove, Second Party agrees to pay to First Party a royalty of Three Dollars and Thirty-Three and One-Third Cents ($3.33-1/3) per two hundred (200) pounds of dried hops harvested by machines purchased by Second Party, said royalty being payable when the amount of bales picked is determined on or before the 15th day of October of each year during the term hereof, for all hops harvested during the preceding twelve (12) calendar months. In any event the minimum royalty payable hereunder shall be Five Hundred Dollars ($500) per machine per annum, and if the royalties computed at the rate of Three Dollars and Thirty-Three and One-Third Cents ($3.33-1/3) per two hundred (200) pounds of hops harvested shall not aggregate as much as Five Hundred Dollars ($500) for each machine in each period of twelve (12) calendar months herein referred to, said sum of Five Hundred Dollars ($500) per machine shall nevertheless be paid to First Party by the following October 15th and any royalties paid on any machine in excess of Five Hundred Dollars ($500) per annum shall not apply against or reduce the minimum royalties payable on any other machines; provided, that if it shall be impossible, in the fair and reasonable judgment of Party of the First Part to use any such machine during any part of a particular picking season because of a serious breakdown or breakdowns of a machine, occurring notwithstanding the exercise of reasonable care on the part of the user or users thereof, an equitable adjustment shall be made of the amount of minimum royalty payable on such machines for such picking season, based upon the number of days during which such machine cannot be used bears to the total number of days in the normal picking season. Second Party agrees that any royalties payable by Second Party may be collected from any source or through any company by the giving of orders to pay if this method is desired by First Party.

9. Second Party will deliver to First Party on or before October 15th of each year during the term hereof, statements in such reasonable details as First Party may request, showing the amount of royalties payable on each machine licensed hereunder and the manner in which such amount was computed. First Party and its agents shall have free access at all times to said machine(s) wherever situated or operated for the purpose of inspecting and observing the operation thereof and determining the amount of hops harvested thereby, and First Party and its agents shall have the right to examine the records of Second Party insofar as may be necessary for the purpose of determining the amount of royalty properly payable hereunder. Second Party shall make and preserve proper records showing the amount of hops harvested by means of each such machine(s).

1. Third Party hereby sells to Second Party and Second Party buys from Third Party, ... (1) Portable Hop Picking machine (s) identified by First Party's serial number(s) as follows:

1 1 55

said machine(s) to be delivered by Third Party to Second Party on or before ..... 19 52.

2. Second Party hereby pays to Third Party as purchase price of said machine(s) the sum of Two Thousand Nine Hundred and no/100 dollars ($ 2,900.00) and Third Party acknowledges receipt of said sum of ..... dollars ($ 2900.00).

3. Second Party shall pay to the order of Third Party, on delivery of said machine(s), in addition to the final installment of the purchase price, the sum of all sales, excise or other taxes levied on the manufacture, sale, delivery and licensing of said machine(s).

4. Second Party shall execute and deliver to First Party to secure the payment of royalty as provided in Paragraph 8 hereof a chattel mortgage in substantially the form submitted herewith as Exhibit "A" or, in lieu thereof, such other security as First Party shall accept. First Party shall not unreasonably decline to accept such other security if, in the fair and reasonable judgment of First Party, such other security adequately and fully secures the payment of reasonably anticipated royalty payable as provided in Paragraph 8. Chattel mortgage or other acceptable security as above to be given annually by Second Party when requested by First Party. Provisions of this paragraph 4, shall be enforced only in the event that Second Party has defaulted in his obligations under the present agreement.

5. Title to said machine(s) shall vest in Second Party on delivery of said machine(s) to Second Party by Third Party, but the vesting of title to said machine(s) in Second Party shall not license Second Party to use said machine(s) and to practice the methods and processes disclosed and claimed in Letters Patent hereinafter listed and related thereto.

LICENSE RE 6'D

6. It is expressly understood that the sale and/or delivery of said machine(s) is without the right to use said machine(s) and/or the methods and processes disclosed and claimed in the Letters Patent listed hereinafter, and that in order to use said machine(s) and/or said methods and processes Second Party must secure from First Party a license to use said machine(s) and/or said methods and processes, and that the continuing right to use said machine(s) and/or said methods and processes is strictly conditioned upon the full and faithful performance of such license;

CONDITIONAL

LIMITATION

WHEREFORE, First Party hereby grants to Second Party a non-exclusive, indivisible and non-transferable license, as long as the terms hereof be fully and faithfully performed and maintained, to use said machine(s), for the purpose for which said machine(s) was/were designed and said methods and processes as disclosed in the following Letters Patent:

U. S. Patent Number	Date of Issue	Invention
2,114,712	April 19, 1938	Method of Keeping the Fingers of Hop Picking Machines Clean
2,114,727	April 19, 1938	Hop Picking Machine
2,116,006	May 3, 1938	Hop and Stem Separator
2,138,529	November 30, 1938	Hop Separator
2,139,029	December 6, 1938	Hop Picking Machine
2,139,046	December 6, 1938	Hop Separator
2,187,526	January 16, 1940	Hop Picking Machine
2,191,183	February 20, 1940	Finger Structure and Supporting Bar for Hop Picking Machine
2,193,354	March 12, 1940	Vine Grasper Bar
2,211,357	August 13, 1940	Hop Picking Machine
2,226,009	December 24, 1940	Hop Separator
2,236,280	December 7, 1943	Hop Cluster Stemmer

Other Patents Pending.

7. The term of the license granted to Second Party by First Party, as provided in Paragraph 6 hereof, shall be from date first above written until completion of the 1956 harvest, irrespective of the date of expiration of any of the Letters Patent hereinbefore listed.

TERM 1 year!

8. For and in consideration of the license, set forth in Paragraph 6 hereinabove, Second Party agrees to pay to First Party a royalty of Three Dollars and Thirty-Three and One-Third Cents ($3.33-1/3) per two hundred (200) pounds of dried hops harvested by machines purchased by Second Party, said royalty being payable when the amount of bales picked is determined on or before the 15th day of October of each year during the term hereof, for all hops harvested during the preceding twelve (12) calendar months. In any event, the minimum royalty payable hereunder shall be Five Hundred Dollars ($500) per machine per annum, and if the royalties computed at the rate of Three Dollars and Thirty-Three and One-Third Cents ($3.33-1/3) per two hundred (200) pounds of hops harvested shall not aggregate as much as Five Hundred Dollars ($500) for each machine in each period of twelve (12) calendar months herein referred to, said sum of Five Hundred Dollars ($500) per machine shall nevertheless be paid to First Party by the following October 15th and any royalties paid on any machine in excess of Five Hundred Dollars ($500) per annum shall not apply against or reduce the minimum royalties payable on any other machines; provided, that if it shall be impossible, in the fair and reasonable judgment of Party of the First Part to use any such machine during any part of a particular picking season because of a serious breakdown or breakdowns of a machine, occurring notwithstanding the exercise of reasonable care on the part of the user or users thereof, an equitable adjustment shall be made of the amount of minimum royalty payable on such machines for such picking season, based upon the number of days during which such machine cannot be used bears to the total number of days in the normal picking season. Second Party agrees that any royalties payable by Second Party may be collected from any source or through any company by the giving of orders to pay if this method is desired by First Party.

9. Second Party will deliver to First Party on or before October 15th of each year during the term hereof, statements in such reasonable details as First Party may request, showing the amount of royalties payable on each machine licensed hereunder and the manner in which such amount was computed. First Party and its agents shall have free access at all times to said machine(s) wherever situated or operated for the purpose of inspecting and observing the operation thereof and determining the amount of hops harvested thereby, and First Party and its agents shall have the right to examine the records of Second Party insofar as may be necessary for the purpose of determining the amount of royalty properly payable hereunder. Second Party shall make and preserve proper records showing the amount of hops harvested by means of each of such machine(s).

[fol. 179]

(See opposite) ☞

10. Second Party will use coir yarn or other twine satisfactory to First Party in the operation of said machine(s), but in any event the royalties provided in Paragraph 8 hereof shall be payable whether or not coir yarn be used and whether or not the methods and processes disclosed and claimed in said Patent No. 2,114,712 be made use of.

11. Second Party concedes the validity of all Letters Patent licensed herein, and further agrees that it will not contest, directly or indirectly, the validity of any herein licensed patent, so long as this agreement remains in full force and effect.

12. First Party agrees to furnish at Sacramento, California, the place of manufacture of said machines, or at such other place at which said machines may hereafter be manufactured, if First Party shall at the time have the same in stock, such replacement parts as may be necessary for making repairs to said machines, and Second Party shall pay or cause to be paid for all such replacement parts furnished by First Party a reasonable price together with all transportation charges and expenses of installation.

13. Second Party shall keep said machine(s) in a good state of repair and shall promptly renew and replace all broken or worn-out parts.

14. Second Party shall pay, prior to delinquency, all taxes on said machine(s) and shall maintain or cause to be maintained Insurance against loss of or damage to said machine(s) by fire, theft and collision in amounts equal to their full insurable value in insurance companies and under policies satisfactory to First Party, and shall, from time to time, give to First Party such information as First Party may reasonably request concerning such insurance and the payment of premiums thereon.

15. In case of any default in the performance of the covenants contained in Paragraphs 12, 13 and 14 hereof, First Party may perform the same and advance all sums necessary for that purpose, repayment of which shall be secured by the chattel mortgages referred to in Paragraph 4 hereof, but such action on the part of First Party shall not relieve Second Party from the consequences of any such default.

16. Second Party shall keep or cause to be kept on said machines in plain view at all times any and all plates and stencils or other markings placed thereon by First Party.

17. First Party shall not be liable for any loss of or damage to said machine(s) nor for any injury to persons or damage to property resulting in any manner from the use or operation thereof, and Second Party shall hold First Party harmless from any claim of any kind referred to in this paragraph.

18. It is agreed that no representations or warranties, express or implied, are or have been made by First Party or any of its agents concerning said machine(s) or the use or operation thereof.

19. First Party shall be under no liability or obligation for any failure or delay in the performance of any terms, covenants or conditions of this agreement on its part to be performed if such failure or delay shall result, in whole or in part, from fire, strike, riot, interruption of the usual means of transportation, failure of First Party's sources of supply or materials, war, act of God, or other elements, or any other cause beyond the control of First Party whether similar or dissimilar to those hereinbefore specified.

20. Second Party shall not assign this agreement nor any interest therein, and shall not permit said machine(s) to become subject to any lien or encumbrance other than the liens for current taxes, nor permit said machine(s) to be removed from Yakima County, State of Washington, nor permit said machine(s) to be seized or levied upon by process of law, without the prior written consent of First Party. First Party shall not unreasonably withhold such consent.

21. This agreement or any extension or continuation shall inure to the benefit of and shall be binding upon the successors, heirs, executors, administrators and assigns of the parties hereto, subject, however, to the provisions of Paragraph 20 hereof.

22. No waiver of or failure to enforce any of the provisions of this agreement nor any extension of time or partial payment of any amount due hereunder before or after delinquency shall operate to extend the time on the payment of the balance of such amount nor be considered as a waiver of the strict performance of this agreement on all subsequent payments and in every other particular.

23. The venue of any action commenced by First Party to enforce the provisions of this agreement or of any chattel mortgage given pursuant hereto may, at the option of First Party, be laid in Yakima County, Washington or Sacramento County, California, and in addition to taxable costs as provided by law, First Party shall be entitled to recover a reasonable sum as attorney's fees in such action.

24. Time is of the essence of this agreement, and each and every provision thereof except as expressly otherwise herein provided.

25. Upon prompt payment in full of Royalties due hereunder within time prescribed in Paragraph 8 above and provided Second Party is not in default in its faithful performance of this agreement and of all its covenants, First Party will allow a discount of 10% of such Royalty; but this provision shall not operate to reduce the minimum Royalty required of Second Party as provided in said Paragraph 8.

26. All remedies herein provided for are cumulative and not exclusive of any other remedies provided herein or by law.

27. The terms of this instrument comprise the entire agreement between the parties hereto, and no variation from the same shall be valid unless made in writing between said parties.

28. Any notice, report or other communication required or permitted to be given the First Party hereunder shall be given in writing by United States registered mail addressed to First Party at 6900 Folsom Boulevard, Sacramento, California, or such other address as First Party may designate by notice in writing to Second Party, and any such notice, report or other communication required or permitted to be given to Second Party may be mailed to Second Party in the same manner at [illegible], Washington, (Route 5, Yakima)
or such other address as may be designated in writing by Second Party to First Party.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate the day and year first above written.

THYS COMPANY [signature]

First Party

damage to property resulting in any manner from the use or operation thereof, and Second Party shall hold First Party harmless from any claim of any kind referred to in this paragraph.

18. It is agreed that no representations or warranties, express or implied, are or have been made by First Party or any of its agents concerning said machine(s) or the use or operation thereof.

19. First Party shall be under no liability or obligation for any failure or delay in the performance of any terms, covenants or conditions of this agreement on its part to be performed if such failure or delay shall result, in whole or in part, from fire, strike, riot, interruption of the usual means of transportation, failure of First Party's sources of supply or materials, war, act of God, or other elements, or any other cause beyond the control of First Party whether similar or dissimilar to those hereinbefore specified.

20. Second Party shall not assign this agreement nor any interest therein, and shall not permit said machine(s) to become subject to any lien or encumbrance other than the liens for current taxes, nor permit said machine(s) to be removed from Yakima County, State of Washington, nor permit said machine(s) to be seized or levied upon by process of law, without the prior written consent of First Party. First Party shall not unreasonably withhold such consent.

21. This agreement or any extension or continuation shall inure to the benefit of and shall be binding upon the successors, heirs, executors, administrators and assigns of the parties hereto, subject, however, to the provisions of Paragraph 20 hereof.

22. No waiver of or failure to enforce any of the provisions of this agreement nor any extension of time or partial payment of any amount due hereunder before or after delinquency shall operate to extend the time on the payment of the balance of such amount nor be considered as a waiver of the strict performance of this agreement on all subsequent payments and in every other particular.

23. The venue of any action commenced by First Party to enforce the provisions of this agreement or of any chattel mortgage given pursuant hereto may, at the option of First Party, be laid in Yakima County, Washington or Sacramento County, California, and in addition to taxable costs as provided by law, First Party shall be entitled to recover a reasonable sum as attorney's fees in such action.

24. Time is of the essence of this agreement, and each and every provision thereof except as expressly otherwise herein provided.

25. Upon prompt payment in full of Royalties due hereunder within time prescribed in Paragraph 8 above and provided Second Party is not in default in its faithful performance of this agreement and of all its covenants, First Party will allow a discount of 10% of such Royalty; but this provision shall not operate to reduce the minimum Royalty required of Second Party as provided in said Paragraph 8.

26. All remedies herein provided for are cumulative and not exclusive of any other remedies provided herein or by law.

27. The terms of this instrument comprise the entire agreement between the parties hereto, and no variation from the same shall be valid unless made in writing between said parties.

28. Any notice, report or other communication required or permitted to be given the First Party hereunder shall be given in writing by United States registered mail addressed to First Party at 6900 Folsom Boulevard, Sacramento, California, or such other address as First Party may designate by notice in writing to Second Party, and any such notice, report or other communication required or permitted to be given to Second Party may be mailed to Second Party in the same manner at Grandview, Washington
or such other address as may be designated in writing by Second Party to First Party.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate the day and year first above written.

THYS COMPANY [signature]

First Party

[signature] Raymond Charvet

Second Party

[signature] Oliver Champoux

Third Party

STATE OF Washington }
County of Yakima } ss

On this 21st day of January, 1951, personally appeared before me [illegible] and Oliver [illegible]

to me known to be the individuals described in and who executed the foregoing instrument, and acknowledged to me that they signed and sealed same as their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal this 21st day of January, 1951

[signature] Elwood Hutcheson

Notary Public for the State of Washington

residing at Yakima.

ELWOOD HUTCHESON NOTARY PUBLIC STATE OF WASHINGTON

[fol. 180]

PLAINTIFF'S EXHIBIT No. 3

(See opposite) ☞

Form A-2

AGREEMENT

THIS AGREEMENT, Made this 31st day of January, 19 41, by and between HOYT COMPANY, a Corporation, hereinafter referred to as First Party, and

[redacted], of [redacted], hereinafter referred to as Second Party and [redacted], of [redacted], hereinafter referred to as Third Party,

WITNESSETH:

WHEREAS, First Party is the licensee of E. Clemens Horst Co., a New Jersey Corporation, of San Francisco, California, under certain United States Letters Patent relating to the art of hop picking and separating machines of both portable and stationary types, hereinafter referred to as hop picking machines or as machines, and under certain United States Letters Patent for improved methods of maintenance of said machines; and

WHEREAS, First Party is willing to license Second Party to use said machines and to practice the methods and processes disclosed and claimed in the Letter Patent hereinafter listed and related thereto, but upon the terms and conditions hereinafter set forth; and

WHEREAS, Second Party is willing to buy certain of said machines from Third Party and to be licensed by First Party to use said machines and to practice the methods and processes disclosed and claimed in the letters Patent hereinafter listed and related thereto, and upon the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the purchase price specified in Paragraph 2 hereof to be paid by Second Party to Third Party, and in consideration of the covenants and agreements herein contained, and for other good, adequate and valuable consideration between the parties moving,

IT IS AGREED as follows:

1. Third Party hereby sells to Second Party and Second Party buys from Third Party, [redacted] (1) Portable Hop Picking machine(s) identified by First Party's serial number(s) as follows:

44-L-138

said machine(s) to be delivered by Third Party to Second Party on or before January 31, 19[redacted].

2. Second Party hereby pays to Third Party as purchase price of said machine(s) the sum of Three Hundred dollars ($300.00) and Third Party acknowledges receipt of said sum of Three Hundred dollars ($300.00).

3. Second Party shall pay to the order of Third Party, on delivery of said machine(s), in addition to the final installment of the purchase price, the sum of all sales, excise or other taxes levied on the manufacture, sale, delivery and licensing of said machine(s).

4. Second Party shall execute and deliver to First Party to secure the payment of royalty as provided in Paragraph 8 hereof a chattel mortgage in substantially the form submitted herewith as Exhibit "A" or, in lieu thereof, such other security as First Party shall accept. First Party shall not unreasonably decline to accept such other security if, in the fair and reasonable judgment of First Party, such other security adequately and fully secures the payment of reasonably anticipated royalty payable as provided in Paragraph 8. Chattel mortgage or other acceptable security as above to be given annually by Second Party when requested by First Party. Provisions of this paragraph 4, shall be enforced only in the event that Second Party has defaulted in his obligations under the present agreement.

5. Title to said machine(s) shall vest in Second Party on delivery of said machine(s) to Second Party by Third Party, but the vesting of title to said machine(s) in Second Party shall not license Second Party to use said machine(s) and to practice the methods and processes disclosed and claimed in Letters Patent hereinafter listed and related thereto.

6. It is expressly understood that the sale and/or delivery of said machine(s) is without the right to use said machine(s) and/or the methods and processes disclosed and claimed in the Letters Patent listed hereinafter, and that in order to use said machine(s) and or said methods and processes Second Party must secure from First Party a license to use said machine(s) and/or said methods and processes; and that the continuing right to use said machine(s) and/or said methods and processes is strictly conditioned upon the full and faithful performance of such license;

WHEREFORE, First Party hereby grants to Second Party a non-exclusive, indivisible and non-transferable license, so long as the terms hereof be fully and faithfully performed and maintained, to use said machine(s), for the purpose of which said machine(s) was/were designed and said methods and processes as disclosed in the following Letters Patent:

U. S. Patent Number	Date of Issue	Invention
2,114,718	April 19, 1938	Method of Keeping the Fingers of Hop Picking Machines Clean
2,114,727	April 19, 1938	Hop Picking Machine
2,116,006	May 3, 1938	Hop and Stem Separator
2,138,589	November 29, 1938	Hop Separator
2,139,670	December 6, 1938	Hop Picking Machine
2,139,040	December 6, 1938	Hop Separator
2,187,826	January 16, 1940	Hop Picking Machine
2,191,183	February 20, 1940	Finger Structure and Supporting Bar for Hop Picking Machine
2,193,264	March 12, 1940	Vine Grasper Bar
2,211,267	August 13, 1940	Hop Picking Machine
2,226,000	December 24, 1940	Hop Separator
2,250,280	December 7, 1948	Hop Cluster Stemmer

Other Patents Pending.

7. The term of the license granted to Second Party by First Party, as provided in Paragraph 6 hereof, shall be from

10. Second Party will use coir yarn or other twine satisfactory to First Party in the operation of said machine(s), but in any event the royalties provided in Paragraph 8 hereof shall be payable whether or not coir yarn be used and whether or not the methods and processes disclosed and claimed in said Patent No. 2,114,712 be made use of.

11. Second Party concedes the validity of all Letters Patent licensed herein, and further agrees that it will not contest, directly or indirectly, the validity of any herein licensed patent, so long as this agreement remains in full force and effect.

12. First Party agrees to furnish at Sacramento, California, the place of manufacture of said machines, or at such other place at which said machines may hereafter be manufactured, if First Party shall at the time have the same in stock, such replacement parts as may be necessary for making repairs to said machines, and Second Party shall pay or cause to be paid for all such replacement parts furnished by First Party a reasonable price together with all transportation charges and expenses of installation.

13. Second Party shall keep said machine(s) in a good state of repair and shall promptly renew and replace all broken or worn-out parts.

14. Second Party shall pay, prior to delinquency, all taxes on said machine(s) and shall maintain or cause to be maintained insurance against loss of or damage to said machine(s) by fire, theft and collision in amounts equal to their full insurable value in insurance companies and under policies satisfactory to First Party, and shall, from time to time, give to First Party such information as First Party may reasonably request concerning such insurance and the payment of premiums thereon.

15. In case of any default in the performance of the covenants contained in Paragraphs 12, 13 and 14 hereof, First Party may perform the same and advance all sums necessary for that purpose, repayment of which shall be secured by the chattel mortgage referred to in Paragraph 6 hereof, but such action on the part of the First Party shall not relieve Second Party from the consequences of any such default.

16. Second Party shall keep or cause to be kept on said machines in plain view at all times any and all plates and stencils or other markings placed thereon by First Party.

17. First Party shall not be liable for any loss of or damage to said machine(s) nor for any injury to persons or damage to property resulting in any manner from the use or operation thereof, and Second Party shall hold First Party harmless from any claim of any kind referred to in this paragraph.

18. It is agreed that no representations or warranties, express or implied, are or have been made by First Party or any of its agents concerning said machine(s) or the use or operation thereof.

19. First Party shall be under no liability or obligation for any failure or delay in the performance of any terms, covenants or conditions of this agreement on its part to be performed if such failure or delay shall result, in whole or in part, from fire, strike, riot, interruption of the usual means of transportation, failure of First Party's sources of supply or materials, war, act of God, or other elements, or any other cause beyond the control of First Party whether similar or dissimilar to those hereinbefore specified.

20. Second Party shall not assign this agreement nor any interest therein, and shall not permit said machine(s) to become subject to any lien or encumbrance other than the lien for current taxes, nor permit said machine(s) to be removed from Yakima County, State of Washington, nor permit said machine(s) to be seized or levied upon by process of law, without the prior written consent of First Party. First Party shall not unreasonably withhold such consent.

21. This agreement or any extension or continuation shall inure to the benefit of and shall be binding upon the successors, heirs, executors, administrators and assigns of the parties hereto, subject, however, to the provisions of Paragraph 20 hereof.

22. No waiver of or failure to enforce any of the provisions of this agreement nor any extension of time or partial payment of any amount due hereunder before or after delinquency shall operate to extend the time on the payment of the balance of such amount nor be considered as a waiver of the strict performance of this agreement on all subsequent payments and in every other particular.

23. The venue of any action commenced by First Party to enforce the provisions of this agreement or of any chattel mortgage given pursuant hereto may, at the option of First Party, be laid in Yakima County, Washington, or Sacramento County, California, and in addition to taxable costs as provided by law, First Party shall be entitled to recover a reasonable sum as attorney's fees in such action.

24. Time is of the essence of this agreement, and each and every provision thereof except as expressly otherwise herein provided.

25. Upon prompt payment in full of Royalties due hereunder within time prescribed in Paragraph 8 above and provided Second Party is not in default in its faithful performance of this agreement and of all its covenants, First Party will allow a discount of 10% of such Royalty; but this provision shall not operate to reduce the minimum Royalty required of Second Party as provided in said Paragraph 8.

26. All remedies herein provided for are cumulative and not exclusive of any other remedies provided herein or by law.

27. The terms of this instrument comprise the entire agreement between the parties hereto, and no variation from the same shall be valid unless made in writing between said parties.

28. Any notice, report or other communication required or permitted to be given the First Party hereunder shall be given in writing by United States registered mail addressed to First Party at 6900 Folsom Boulevard, Sacramento, California, or such other address as First Party may designate by notice in writing to Second Party, and any notice, report or other communication required or permitted to be given to Second Party may be mailed to Second Party at Grandview, Washington or at ..... or such other address as may be designated in writing by Second Party to First Party.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate the day and year first above written.

THYS COMPANY

By .....

[fol. 182]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

OPINION—Filed June 28, 1961

This is a suit for royalties claimed due under sale and licensing contracts covering certain hop-picking machine patents listed therein. The plaintiff alleges non-payment of royalties and seeks judgment for the minimum annual royalties together with an accounting to determine any additional sum that may be due. The defendants entered a denial and plead certain affirmative defenses.

The facts, in the main, are not disputed. The plaintiff entered into a licensing contract with the defendant Brulotte on August 10, 1948, which contract was to run to the completion of the 1958 harvest season. The defendant Charvet's agreement commenced on January 31, 1951, and extended to the completion of the 1960 harvest season. Both contracts are essentially the same in content and listed twelve patents together with "other patents pending".

It is admitted that only six or seven of the patents listed were incorporated into the machines here in question and that all of those patents expired on or before 1957. Of the patents pending at the time the agreements were entered into it is agreed that one patent (Exhibit 22) was pending as to both defendants at the time the contracts were entered into and that said patent does not expire until 1969. One patent (Exhibit 23) was pending as to Brulotte but not as to Charvet and is as yet unexpired. One patent (Exhibit 25) was pending as to Charvet but not as to [fol. 183] Brulotte and it is unexpired. These patents pending were available for use by the defendants but the record is inconclusive as to whether or not they were in fact used or incorporated into the machines. Three patents were declared invalid by lower Federal Courts. One of the patents declared invalid was a method patent (Exhibit 6) and another patent (Exhibit 15) was admittedly never incorporated into the machines. The other patent declared invalid (Exhibit 23) was a patent pending as to Brulotte only.

It is further admitted that the contracts were signed as alleged in the complaints and that neither defendant paid any royalties after the 1952 season. The defendant Brulotte testified that he used the machine from the period 1953 to 1958, both inclusive. The defendant Charvet stated that he did not use the machine after 1952, at which time he removed his hopyard and that in 1958-1959 he raised hops but did not use the machine listed in the contract.

It is further agreed that the form contracts used covered portable hop-picking machines and that the contracts were uniform with other contracts used whether they were three-party contracts or two-party contracts. The contracts purport to pass title to the machines to the defendants but provide that they shall not be used except under licenses specified in the contracts which also provide for payment of royalties. See sections 6, 7 and 8 of contracts (Exhibits 1 and 3).

The affirmative defenses of the defendants raise the following issues: (1) Are the actions barred by the statute of limitations? (2) Is there a failure on the part of the plaintiff to comply with the terms of the contract? (3) Is [fol. 184] there an eviction or failure of consideration because of invalidity of three patents? (4) Is the plaintiff guilty of fraud? (5) Are the contracts void or unenforceable as against public policy because of attempted restrictions in the use of the machines after sale? (6) Are the contracts void as against public policy or unenforceable because of misuse of patent rights by the plaintiff in: (a) tying-in patents not in use in the machines; (b) extending licenses beyond terms of patents, and (c) restricting free use of machine by having patents on relatively inconsequential portion of the total machine.

Besides the above affirmative defenses the defendants argue that the royalties cannot be collected because (1) the machines were not used, and (2) because the contracts were terminated by the defendants' default in paying the royalties.

I find no substance in the argument of the defendants that the contracts were terminated by the default of the defendants, since it appears to me that under the language of the contracts contained in paragraph six thereof, it was

the intent of the parties that the contracts could only be cancelled at the election of the plaintiff in the event of default or payment of royalties. A party should not be allowed to take advantage of his own default unless the language in the contract is clear and specific as to such right. This contract provides that the right to use the machines is conditioned upon full performance by the licensee. The contract is for a definite term and I am convinced from the reading of it that the parties intended that it run for that term. If defendants' contentions are meritorious then the contract would be cancellable at will of [fol. 185] the defendants. As stated, I am sure that is not what was intended. I, therefore, hold that the contracts herein were not terminated by the defaults of the defendants.

I also find there is no merit in the defendants' contentions that the royalties cannot be collected while the machine is not in use. That argument flies in the face of the whole intent and wording of the contracts. If that argument were meritorious then the parties certainly would not have fixed minimum royalties.

I also find no merit in the first four affirmative defenses. The first, second and fourth affirmative defenses were not sustained by the evidence and were not argued, and therefore, I assume the defendants found no comfort in them. As to the third affirmative defense, that is, the defense of eviction or failure of consideration, it seems to me there is likewise lack of evidence. The licenses here cover not one single patent but several, and were *non-exclusive*. There is no evidence in the record that the three patents which were declared invalid were the "substance" of the agreement or had any effect whatsoever on the operation of the machines or caused the defendants any concern, much less *evict* them from the use of the machine. It is admitted that at least one of the patents (Exhibit 7), was for a total hop-picking machine and this patent was not declared invalid. It is the general rule that courts will not inquire into the adequacy of consideration as long as some consideration exists. It is evident that there was some consideration here and the defendants have not sustained the

burden of proving that it was insufficient consideration any more than they have sustained the burden of proving that [fol. 186] they have been evicted from the use of the machines. The defendants got what they bargained for and may not complain about inconsequential matters. See *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.* (C. A. 1), 176 Fed. 2d 799. See also *North Drive-in Theatre Corp.* v. *Park-In Theatres* (C. A. 10), 248 F. 2d 232.

The next contention made by the defendants' fifth affirmative defense is that the contracts are void as against public policy because of attempted restrictions in the use of the machines after sale. The defendants contend that the plaintiff cannot sell the machines and at the same time control the right to use the machines. In other words, that at the time of the sale the machine passed beyond the monopoly of the plaintiff. The cases cited by defendants, however, deal with the attempts on the part of the patentee to control the resale prices of patented articles, or in some other way to restrain or limit the use of the articles. None of those cases hold that a contract is invalid simply because it requires the payment of royalties after passing of bare title.

Our Supreme Court in the case of *Thys* v. *State*, 31 Wn. 2nd 739, held that the royalties provision under this same type of contract kept the sale from being an "unconditional" sale since it conveyed bare title without right of use and that the royalties were in effect a part of the purchase price. I think that case and the cases cited therein are conclusive in favor of the plaintiff in this matter even though this question was not squarely presented in the former *Thys* case. Certainly, it is a recognition by the court that this is not an unconditional sale. Furthermore, the cases cited by the defendants were mostly patent in- [fol. 187] fringement cases or cases brought under the anti-trust laws and concerned attempts by patentees to clearly control the use or resale of patented articles after they had passed unconditional titles. They do not say that a patentee may not collect royalties as a part of the sale and as a condition thereto.

The matters chiefly relied on by the defendants, however, are contained in their sixth affirmative defense. They argue that the contracts are void as against public policy or unenforceable because of misuses of patent rights in three particulars, namely: (a) tying-in patents not used in the machines (b) extending licenses beyond terms of patents (c) restricting free use of the machines by having patents on a relatively inconsequential portion of the total machines. The allegations of misuse contain in (c) above are clearly not sustained by the evidence. As stated before, at least one patent is for a whole hop picking-machine. Certainly, there is no evidence upon which a court could find that the patents used are "inconsequential".

As to items of misuse (a) and (b), the defendants principally rely upon the case of *American Securit Company* v. *Shatterproof Glass Corporation* (C. A. 3), 268 F. 2d 769 (1959), wherein the court held that mandatory patent packaging licensing constituted a misuse of patents and also held that a provision in a licensing agreement which provides that the agreement should continue in full force and effect to the expiration of the last patent to expire constituted patent misuse by extending the payment of royalties beyond the expiration date of some of the patents. On the other hand, as to item (a), the plaintiff relies mainly upon [fol. 188] the case of *Automatic Radio Manufacturing Company* v. *Hazeltine Research Inc.*, 77 F. Supp. 493, affirmed (C. A. 1), 176 F. 2d 799, affirmed 339 U. S. 827, 94 L. ed. 1312.

The *American Securit* case is distinguishable from the case here under consideration as to item (a) in that the patentee in that case did not desire to license the licensee under any of the patents unless it licensed it under all of them. In other words, in that case it appeared that the licensee was *compelled* to accept a package of patents whether it needed some of them or not, and that, therefore, the unwanted patents were tied in with the ones that were really wanted and did not stand on their own feet. The court held that each monopoly must stand on its own footing and cannot be conditioned upon the acceptance of another patent. There is no evidence in the record here that the defendants, or either of them, had sought and been re-

fused a license covering less than those listed in the agreement or that the plaintiff refused to grant a license under any one or more of its patents to anyone who refused to take a license under all of them. The plaintiff was merely licensing the right to use a machine and threw in all of the patents it had, regardless of whether they were being used in the machine at the present time or not.

The agreements here were essentially for the sale and use of hop-picking machines and as stated before, the defendants received just what they bargained for. They received the machines and were never disturbed in their use of them. If any patents were included which were not needed in the use of the machines, they were mere surplusage and there is no evidence from which the court might conclude that [fol. 189] any special value was placed upon any of the patents which were not incorporated in the machines. If the court could find from the evidence that the defendants were paying for something that they did not need then a different matter would be presented. In any event, the contracts do not become unenforceable merely because the licensees in a particular year do not happen to utilize a particular patent. The licensees had the right to use all of the patents and if they choose not to use them that is their own business. It does not change the fact that they had a *right* to use them, and that is all they bargained for. As a matter of fact, however, in this case the listings of the various unused patents seem to me to be extremely inconsequential since as stated before, the defendants received just what they bargained for, namely, the title to and the right to use a certain hop-picking machine.

Undoubtedly, the *Securit* case enlarged the misuse doctrine to cases where the use of one patent is used to strengthen the licensing appeal of another patent. The doctrine should not apply, however, where the whole package pertains or is necessary to the production of a *single product* for which the licensee is bargaining. In such a case the licensee can only complain when the package is not large enough—not when it is too large. The licensee knows exactly what he wants and is getting, viz., a certain product or machine together with the free and uninterrupted use thereof, and if he gets that how can he complain that

he has been given too many patents, unless he can show that the additional patent cost him extra. There has been no such showing in this case. All parties knew what was [fol. 190] being transferred, all knew the price, and all agreed. No evidence has been adduced to show any mandatory tying-in of unwanted patents or to show any special or additional charges for unused or unwanted patents. The defendants have, therefore, not sustained the burden of proof as to item (a).

As to item (b), i.e., the extending of the life of the licenses beyond the life of the listed patents, the defendants rely solely on the *Securit* case. In the instant case the contracts (Exhibits 1 and 3) provide that the term of the license shall be from the date of the agreement until the end of a certain year's harvest "irrespective of the date of expiration of any of the letters patent hereinabove listed". As a matter of fact, all of the patents listed and used in the machines expired in 1955 or 1957. The patents pending (only the patents pending at time contracts were entered into are of significance, viz., Exhibits 22, 23 and 25) were not expired and two of such patents pending apply to each party defendant. Therefore, it may be said that most, but not all patents contemplated by the parties had expired prior to the end of the licensing terms. The *Securit* case holds that failure to provide for reduction in package royalties upon the expiration of individual patents contained in the package constitutes misuse. Such a holding, therefore, requires that each patent, if the licensee so desires, be priced and licensed individually even though pertaining to a single product. Such a requirement makes sense if each patent pertains to some separate process or product, since each should stand on its own footing. But where the parties are dealing in regard to *one* product, such as a hop-picking machine, which is their sole concern, [fol. 191] then the requirement of a separate listing puts an undue and meaningless burden on both licensee and patentee by dividing and dissipating their rights and by making a simple thing extremely complicated, tricky, and difficult to understand by the ordinary layman. In any event, I think it clear that the great majority of cases hold that the following of such a requirement is not necessary

to avoid misuse. The defendants here knew or were charged with the knowledge of the expiration dates of the patents, but nevertheless agreed to extend the royalty payments over a longer term than most of the patents, which arrangement was as much or more for their own benefit as for the plaintiff's benefit. It seems to me that they cannot now complain of unclean hands caused by an *anticipated* condition brought on by operation of law. A majority of the courts so hold. See *Six Star Lub. Co.* v. *Morehouse* (Colo.), 74 Pac. 2d 1239; *H. P. M. Develop. Corp.* v. *Watson Stillman Co.*, 71 Fed. Supp. 906; *Pressed Steel Car Co.* v. *U. P. Ry. Co.* (C. A. 2), 270 Fed. 518; *E. R. Squibb & Sons* v. *Chem. Foundation* (C. A. 2), 93 Fed. 2d 475; *Chic. Pneumatic Tool Co.* v. *Ziegler* (C. A. 3), 151 Fed. 2d 784; *Hope Basket Co.* v. *Product Advancement Corp.* (C. A. 6), 187 Fed. 2d 1008; 69 C. J. S. 780, section 252 and section 262.

There was no misuse of patents and therefore defendants cannot prevail on their sixth affirmative defense.

The plaintiff is therefore entitled to recover against both defendants as prayed for in the complaints.

Lloyd L. Wiehl, Judge.

[fol. 192]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and CECILIA BRULOTTE, his wife, Defendants.

AFFIDAVIT OF WALTER C. BRULOTTE

State of Washington,
County of Yakima, ss.:

Walter C. Brulotte, being first duly sworn, on oath deposes and says: He is one of the defendants above named and makes this affidavit pursuant to the order of Court of October 6, 1961.

The hops harvested by affiant with Thys portable hop-picking machine No. 44-L-59 for the years 1953 through 1958, inclusive, in units of 200-pound bales are as follows:

1953	—	290
1954	—	310
1955	—	190
1956	—	205
1957	—	60
1958	—	125

Walter Brulotte.

Subscribed and sworn to before me this 12 day of October, 1961.

E. F. Velikanje, Notary Public in and for the State of Washington, residing at Yakima.

Proof of service (omitted in printing).

[fol. 193] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 195]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and CECILIA BRULOTTE, his wife, Defendants.

No. 43602

THYS COMPANY, a corporation, Plaintiff,

vs.

RAYMOND CHARVET and BLANCHE CHARVET, his wife, Defendants.

ORDER DENYING MOTION TO RECONSIDER AND FOR NEW TRIAL—September 21, 1961

This Matter having duly come on for argument upon the defendants' motion to reconsider the memorandum opinion of the court herein or in the alternative for a new trial, and the court having heard the arguments of counsel and being duly advised in the premises;

Now, Therefore, It Is Hereby Ordered that the defendants' said motion to reconsider the memorandum opinion of the court and the defendants' motion for a new trial and each of them are hereby denied.

Done In Open Court this 21st day of September, 1961.

Lloyd L. Wiehl, Judge.

Presented by:

Cheney & Hutcheson, By: Elwood Hutcheson, Attorneys for Plaintiff.

[fol. 196] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and CECILIA BRULOTTE, his wife, Defendants.

No. 43602

THYS COMPANY, a corporation, Plaintiff,

vs.

RAYMOND CHARVET and BLANCHE CHARVET, his wife, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed October 6, 1961

These two consolidated causes having heretofore duly come on for trial together before the undersigned judge of the above entitled court sitting without a jury, and the plaintiff being present by its president and by its attorneys Cheney & Hutcheson, and the defendants being present in person and by their attorneys, Velikanje & Moore and Charles C. Countryman, and the court having heard the evidence and the arguments of counsel and being duly advised in the premises, and the court having heretofore filed its written memorandum opinion herein and having heretofore denied the defendants' motion for reconsideration and motion for new trial;

Now, Therefore, the court does hereby make the following

Findings of Fact

1.

That at all times herein mentioned, plaintiff herein, Thys Company, was, and now is, a corporation duly or- [fol. 197] ganized and existing pursuant to the laws of the State of California, and that it has paid all license fees due to the State of Washington.

2.

That at all times herein mentioned the defendants Walter C. Brulotte and Cecilia Brulotte were and now are husband and wife and as such constitute a marital community and reside in Yakima County, Washington. That at all times herein mentioned, the defendants Raymond Charvet and Blanche Charvet were and now are, husband and wife and as such constitute a marital community and reside in Yakima County, Washington.

3.

That on August 10, 1948, for valuable consideration the plaintiff and the defendant Walter C. Brulotte for and on behalf of said marital community entered into a written contract whereby said defendants purchased one certain Thys portable hop picking machine No. 44-L-59, and the plaintiff, as the licensee and holder of certain United States patent rights thereon, granted a license to said defendants for the use of said patented hop picking machine, and said defendants promised and agreed to pay to the plaintiff an annual royalty from the date thereof until the completion of the 1958 hop harvest at the rate of $3.33⅓ per bale of 200 pounds of dried hops harvested by said picking machine, with an annual minimum royalty of not less than $500.00 plus tax per year. A copy of said contract was admitted in evidence as plaintiff's Exhibit No. 1 herein and the same is incorporated by reference herein. At all times subsequent thereto said hop picking machine has been in the possession and control of said defendants.

[fol. 198] 4.

That on or about the 31st day of January, 1951, for valuable consideration, the plaintiff and the defendant Raymond Charvet, for and on behalf of said marital community entered into a written contract whereby said defendants purchased one certain Thys portable hop picking machine No. 44-L-132, and the plaintiff, as the Licensee and hold of certain United States patent rights thereon, granted a license to said defendants for the use of said patented hop picking machine, and said defendants promised and agreed to pay to the plaintiff an annual royalty from the date thereof until the completion of the 1960 hop harvest at the rate of $3.33⅓ per bale of 200 pounds of dried hops harvested by said picking machine, with an annual minimum royalty of not less than $500.00 plus tax per year. A copy of said contract was admitted in evidence as plaintiff's Exhibit No. 3 and the same is incorporated by reference herein. At all times subsequent thereto said hop picking machine has been in the possession and control of said defendants.

5.

That repeated demands have been made by the plaintiff upon both the defendants Brulotte and Charvet for the payment of hop picking machine royalties pursuant to said written contracts, but no payment whatever has been made by either of said defendants for any year subsequent to 1952, and prior to the trial of these actions said defendants failed to furnish the plaintiff with any information as to the quantity of hops picked with said picking machines or either of them, and the plaintiff had no knowledge or information with reference thereto. Under state law as construed by the supreme court there was also payable by the defendants a state sales tax in the sum of [fol. 199] 4 per cent of said royalties payable annually. Under said agreements there was a minimum annual royalty in the sum of at least $520.00, including said state sales tax. Plaintiff has duly performed all of the terms and conditions of said contract by it to be performed.

6.

Said Charvet's hop picking machine has not been used or operated since 1952. The defendants Charvet are therefore liable for said annual minimum royalty in the sum of $520.00 per year including said state sales tax, which became due and payable on October 15th of each year under said contract commencing October 15, 1953, for each year to and including 1959.

7.

The defendants have failed to sustain the burden of proof as to each and all of the affirmative defenses herein. Each of these actions was commenced prior to October 15, 1959. Neither of the parties herein ever gave the other any oral or written notice of termination or cancellation of said license-royalty contracts or either of them; and the plaintiff never elected to terminate said contracts by reason of any default on the part of the defendants. It is admitted in the pleadings that seven and only seven of the twelve of the plaintiff's patents listed by number in said contracts were incorporated into the defendants' hop picking machines, and all of those patents expired on or before 1957. Of the patents pending at the time the agreements were entered into one patent (Exhibit 22) was pending when both defendants' contracts were entered into and said patent does not expire until 1969. One patent (Exhibit 23) [fol. 200] was pending as to Brulotte but not as to Charvet and is as yet unexpired; and one patent (Exhibit 25), was pending as to Charvet but not as to Brulotte and is as yet unexpired. Three patents were declared invalid by lower federal courts, namely Exhibit 6, a method patent, Exhibit 15 which was never incorporated into defendants' portable hop picking machines, and Exhibit 23 which was not listed by number in these contracts and was subsequently issued and was a patent pending as to Brulotte but not as to Charvet. There has been no disturbance or interference with the defendants' continued possession and use or right of use of said hop picking machines, and the defendants have not been evicted in the enjoyment of their privileged use of said hop picking machines under said non-exclusive

license contracts, and there has been no eviction or failure of consideration with reference thereto. Plaintiff has not been guilty of any fraud or misrepresentation to the defendants with reference thereto. Said contracts (Exhibits 1 and 3) were form contracts and covered said portable hop picking machines and were uniform with other contracts used by the plaintiff whether they were three-party or two-party contracts. The plaintiff was not guilty of any misuse of its patent rights.

8.

Each of said contracts provides that defendants agreed to pay plaintiff's reasonable attorneys' fees in any court litigation. That the sum of $1,500.00 is a reasonable sum to be allowed the plaintiff herein as attorneys' fees in the Brulotte case. That the sum of $1,500.00 is a reasonable sum to be allowed the plaintiff herein as attorneys' fees in the Charvet case.

From the Foregoing Findings of Fact the court now makes the following

[fol. 201] Conclusions of Law

1.

That under the law and the evidence there is no merit in any of the defendants' affirmative defenses herein. These actions are not barred by the statute of limitations. Said contracts were not terminated by the defaults of the defendants. The defendants have not been evicted in the enjoyment of their privileged use of said hop picking machines, and there has been no eviction or failure of consideration. There has been no fraudulent misrepresentation with reference thereto on the part of the plaintiff. There was no failure on the part of the plaintiff to comply with the terms of said contracts. Said royalty contracts are not void, against public policy, or unenforceable, either because of attempted unlawful restrictions in the use of the machines after sale, or because of misuse of patent rights by the plaintiff or otherwise. There has been no misuse of its patent rights by the plaintiff, and the plaintiff has not come into court herein with unclean hands.

2.

That the plaintiff is entitled to have entered in the Brulotte case an order requiring the defendants therein to promptly make and furnish an accounting with reference to the quantity of hops picked during said period with said hop picking machine and the amount of royalties due and payable therefor; and thereafter that judgment and decree be entered in said Brulotte case herein accordingly in favor of the plaintiff and against the defendants therein.

3.

That by reason of the fact that the testimony heretofore shows without dispute the facts hereinabove stated in para- [fol. 202] graph 6 of the findings of fact with reference to the use of the Charvet machine, a further accounting with reference to the extent of use of the Charvet machine would be useless and unnecessary.

4.

That the plaintiff is entitled to have and recover judgment against the defendants in the Charvet case for the said minimum agreed royalty including state sales tax, irrespective of the use or non-use of said machine, in the sum of $520.00 per year for each of said years from 1953 to and including 1959 to-wit the total principal sum of $3,640.00 together with interest thereon at 6 per cent per annum from October 15th of each of said years commencing October 15, 1953 upon each of said annual royalty payments, said interest to this date being the total sum of $1,092.00, or a total amount of principal and interest as of this date in the sum of $4,732.00 together with interest thereon at 6 per cent per annum from October 15, 1961 until paid and together with plaintiff's reasonable attorney's fees in said case in the sum of $1,500.00 and together with plaintiff's costs and disbursements incurred in the Charvet case hereinafter to be taxed.

Done In Open Court this 6th day of October, 1961.

Lloyd L. Wiehl, Judge.

Presented by:

Cheney & Hutcheson, By Elwood Hutcheson, Attorneys for Plaintiff.

[fol. 203] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and CECILIA BRULOTTE, his wife, Defendants.

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed October 20, 1961

This Cause having heretofore duly come on for trial before the undersigned judge of the above entitled court sitting without a jury, and the plaintiff being present by its president and by its attorneys, Cheney & Hutcheson, and the defendants being present in person and by their attorneys, Velikanje & Moore and Charles C. Countryman, and the court having heard the evidence and the arguments of counsel and being duly advised in the premises, and the court having heretofore filed its written memorandum opinion herein and having heretofore denied the defendants' motion for reconsideration and motion for new trial; and the court having heretofore entered its interlocutory order of accounting herein and the defendants having thereafter filed his affidavit pursuant thereto and the same having been accepted by the plaintiff without the necessity of any further accounting hearing herein;

Now, Therefore, the court does hereby make the following

Supplemental Findings of Fact

1.

Paragraphs 1, 2, 3, 5, 7, and 8 of the findings of fact and conclusions of law entered in consolidated causes No. 43538 and 43602 in the above entitled court on October 6, 1961 are repeated, reaffirmed and incorporated by reference herein.

[fol. 204]

2.

The hops harvested by the defendant Walter C. Brulotte with his Thys portable hop picking machine No. 44-L-59 for the years 1953 through 1958, inclusive, in units of 200-pound bales were as follows.

1953—290
1954—310
1955—190
1956—205
1957— 60
1958—125

From the foregoing supplemental findings of facts the court now makes the following

Conclusions of Law

1.

Paragraph 1 of the conclusions of law entered in the consolidated causes No. 43538 and 43602 in the above entitled court on October 6, 1961 is repeated, reaffirmed and incorporated by reference herein.

2.

That the plaintiff is entitled to have and recover judgment against the defendants in the Brulotte case in the sum of $1,005.34 together with interest thereon at 6 per cent per annum from October 15, 1953 until paid, plus $1,074.66 together with interest thereon at 6 per cent per annum from October 15, 1954 until paid, plus $658.66 together with interest thereon at 6 per cent per annum from October 15, 1955 until paid, plus $710.66 together with in-

terest thereon at 6 per cent per annum from October 15, 1956 until paid, plus $520.00 together with interest thereon at 6 per cent per annum from October 15, 1957 until paid, plus $520.00 together with interest thereon at 6 per cent per annum from October 15, 1958 until paid; each of said principal amounts including 4 per cent state sales tax; or [fol. 205] the total principal sum of $4,489.32 plus total interest in the sum of $1,602.64 computed to October 15, 1961, or the total sum of $6,091.96, together with interest on said last mentioned sum at 6 per cent per annum from October 15, 1961 until paid, and together with plaintiff's reasonable attorneys' fees in this action in the sum of $1,500.00 and together with plaintiff's costs and disbursements herein to be taxed.

Done In Open Court this 20th day of October, 1961.

Lloyd L. Wiehl, Judge.

Presented by:

Cheney & Hutcheson, By Elwood Hutcheson, Attorneys for Plaintiff.

OK As to Form:

Charles C. Countryman, Of Counsel for Defendants.

[fol. 206] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and CECILIA BRULOTTE, his wife, Defendants.

JUDGMENT—October 20, 1961

This Cause having heretofore duly come on for trial before the undersigned judge of the above entitled court sit-

ting without a jury, and the plaintiff being present by its president and by its attorneys, Cheney & Hutcheson, and the defendants being present in person and by their attorneys, Velikanje & Moore and Charles C. Countryman, and the court having heard the evidence and the arguments of counsel and being duly advised in the premises; and the court having heretofore filed its written memorandum opinion herein and having heretofore denied the defendants' motion for reconsideration and motion for new trial; and the court having heretofore entered its interlocutory order of accounting herein and the defendant having thereafter filed his affidavit pursuant thereto and the same having been accepted by the plaintiff without the necessity of a further accounting hearing herein, and the court having heretofore duly made and entered its supplemental findings of fact and conclusions of law;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff herein Thys Company, a corporation, does hereby have and recover judgment against the defen- [fol. 207] dant Walter C. Brulotte and the marital community composed of Walter C. Brulotte and Cecilia Brulotte, husband and wife, in the sum of $1,005.34 together with interest thereon at 6 per cent per annum from October 15, 1953 until paid, plus $1,074.66 together with interest thereon at 6 per cent per annum from October 15, 1954 until paid, plus $658.66 together with interest thereon at 6 per cent per annum from October 15, 1955 until paid, plus $710.66 together with interest thereon at 6 per cent per annum from October 15, 1956 until paid, plus $520.00 together with interest thereon at 6 per cent per annum from October 15, 1957 until paid, plus $520.00 together with interest thereon at 6 per cent per annum from October 15, 1958 until paid; each of said principal amounts including 4 per cent state sales tax; or the total principal sum of $4,489.32 plus total interest in the sum of $1,602.64 computed to October 15, 1961, or the total sum of $6,091.96, together with interest on said last mentioned sum at 6 per cent per annum from October 15, 1961 until paid, and together with plaintiff's reasonable attorneys' fees in this action in the sum of

$1,500.00 and together with plaintiff's costs and disbursements herein to be taxed.

Done In Open Court this 20th day of October, 1961.

Lloyd L. Wiehl, Judge

Presented by:

Cheney & Hutcheson, By Elwood Hutcheson, Attorneys for Plaintiff.

OK As to Form:

Charles C. Countryman, Of Counsel for Defendants.

[fol. 208]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

No. 43538

THYS COMPANY, a corporation, Plaintiff,

vs.

WALTER C. BRULOTTE and CECILIA BRULOTTE, his wife, Defendants.

NOTICE OF APPEAL—Filed November 17, 1961

To: Thys Company, a corporation, Plaintiff;

and

To: Cheney & Hutcheson, attorneys for Plaintiff:

You, and Each of You, are hereby notified that the defendants, Walter C. Brulotte and Cecilia Brulotte, his wife, feeling themselves aggrieved, do hereby appeal to the Supreme Court of the State of Washington from the judgment signed by the Court on October 20, 1961, and filed with the Clerk of Court on October 20, 1961, wherein and whereby the plaintiff, Thys Company, a corporation, was awarded judgment against the defendants for the sum of $6,091.96, together with interest on said sum at 6% per

annum from October 15, 1961, until paid; and together with plaintiff's attorneys' fees in the sum of $1,500.00; and together with plaintiff's costs and disbursements incurred; and also appeal from the order signed and filed on the 21st day of September, 1961, which order denied defendants' motion to reconsider memorandum opinion or in the alternative for a new trial.

Dated at Yakima, Washington, this 3d day of November, 1961.

Velikanje & Moore, By Charles C. Countryman, Attorneys for Defendants.

Proof of Service (omitted in printing).

[fol. 209] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

No. 43602

THYS COMPANY, a corporation, Plaintiff,

vs.

RAYMOND CHARVET and BLANCHE CHARVET, his wife, Defendants.

JUDGMENT—October 6, 1961

This cause having heretofore duly come on for trial before the undersigned judge of the above entitled court sitting without a jury, and the plaintiff being present by its president and by its attorneys Cheney & Hutcheson, and the defendants being present in person and by their attorneys Velikanje & Moore and Charles C. Countryman and the court having heard the evidence and the arguments of counsel and being duly advised in the premises, and the court having heretofore filed its written memorandum opinion herein and having heretofore denied the defendants'

motion for reconsideration and motion for new trial, and the court having heretofore duly made and entered its findings of fact and conclusions of law;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff herein Thys Company, a corporation, does hereby have and recover judgment against the defendant Raymond Charvet and the marital community composed of Raymond Charvet and Blanche Charvet, husband and wife, in the total principal amount of $3,640.00 together with accrued interest thereon to this date in the total sum of $1,092.00 or the total amount of principal and interest in the sum of $4,732.00, together with interest thereon at 6 per cent per annum from October 15, 1961 until paid and together with plaintiff's reasonable attorneys' fees in the sum of $1,500.00 and together with plaintiff's costs and disbursements herein to be taxed.

[fol. 210] Done In Open Court this 6th day of October, 1961.

Lloyd L. Wiehl, Judge

Presented by:

Cheney & Hutcheson, By Elwood Hutcheson, Attorneys for Plaintiff.

[fol. 211] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY
No. 43602

THYS COMPANY, a corporation, Plaintiff,

vs.

RAYMOND CHARVET and BLANCHE CHARVET, his wife, Defendants.

NOTICE OF APPEAL—Filed November 3, 1961

To: Thys Company, a corporation, Plaintiff;

and

To: Cheney & Hutcheson, attorneys for Plaintiff:

You, and Each of You, are hereby notified that the defendants, Raymond Charvet and Blanche Charvet, his wife, feeling themselves aggrieved, do hereby appeal to the Supreme Court of the State of Washington from the judgment signed by the Court on the 6th day of October, 1961, and filed with the Clerk of Court on the 6th day of October, 1961, wherein and whereby the plaintiff, Thys Company, a corporation, was awarded judgment against the defendants for the sum of $4,732.00, together with interest thereon at 6% per annum from October 15, 1961, until paid; and together with $1,500.00 for plaintiff's attorneys' fees; and together with plaintiff's costs and disbursements incurred; and also appeal from the order signed and filed on the 21st day of September, 1961, which order denied defendants' motion to reconsider memorandum opinion or in the alternative for a new trial.

Dated at Yakima, Washington, this 3d day of November, 1961.

Velikanje & Moore, By Charles C. Countryman, Attorneys for Defendants.

Proof of Service (omitted in printing).

[fol. 212]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 36357

Department One

THYS COMPANY, a corporation, Respondent,

v.

WALTER C. BRULOTTE and CECILIA BRULOTTE, his wife, Appellants.

THYS COMPANY, a corporation, Respondent,

v.

RAYMOND CHARVET and BLANCHE CHARVET, his wife, Appellants.

OPINION—Filed June 6, 1963

This is a suit for royalties claimed due under sale and licensing contracts covering certain portable hop-picking machine patents listed therein. The trial court awarded judgment to the plaintiff for accrued and unpaid royalties, finding that such royalties were due and owing and that none of the affirmative defenses alleged by the defendants had been established.

Mainly, the defenses urged by the defendants on appeal relate to the validity of the licensing contracts. It is contended that the contracts were illegal because (1) they [fol. 213] placed restrictions on the subsequent free use of the patents after they were sold, (2) they conditioned the grant of a license on some patents on acceptance of a license on a larger group of patents, (3) they licensed the use of patents beyond the 17-year period of monopoly granted by the sovereign, and (4) they violated the anti-trust laws of the United States. It is also contended that the contracts were terminated when the defendants first

failed to pay royalties when they became due. For a last defense, the defendants allege that they were not obligated to pay royalties for the years when the machines were not in use.

Before discussing these contentions, it will be well to describe the contracts under consideration in this action and the facts leading up to the litigation.

The plaintiff Thys Company, of which Mr. Edouard Thys, an inventor, was and is the president, holds numerous duly issued patents on mechanical hop-picking machines. The defendants are hop farmers who purchased portable hop-picking machines from sellers other than the plaintiff. In connection with the purchase of these machines, which embodied devices patented by the plaintiff, each defendant agreed to pay the plaintiff royalties for the use of his machine for a period which was to end 17 years after the date the machine was first sold by the plaintiff. The royalties were to be paid at the rate of $3.33⅓ per two hundred pounds of hops harvested with the machines, and in any event a minimum royalty of $500 per year was to be paid for the use of each machine.

Under the terms of the licensing provisions of the contract, the defendants were entitled to use the machines and to make use of any of the patents which were owned by the plaintiff, as well as patents pending on hop-picking devices [fol. 214] and methods, all of which were listed in the contracts, so long as they abided by the terms of the contracts. Not all of the patented items were used in the machines, and it was the purpose of the provision licensing use of all the patents to enable the purchasers to utilize the other patented items if they so desired without being obliged to pay additional royalties.

There was an agreement on the part of the defendants to keep records of the amount of hops harvested and to render annual accountings to the plaintiff. The defendants also agreed to keep the machines in good repair during the term of the licenses, and to keep them insured. The plaintiff agreed to furnish replacement parts when they were in stock. There was an agreement not to assign the contract or to allow the machines to become subject to any lien or encumbrance other than liens for current taxes, without

the consent of the plaintiff. The plaintiff agreed that such consent should not be unreasonably withheld.

In each contract, there were provisions that failure to enforce a provision would not operate as a waiver of the right to require subsequent strict performance; that time was of the essence of the contract; that a discount would be allowed for prompt payment of royalties; that the defendants should pay reasonable attorneys fees to plaintiff in the event legal action should become necessary to enforce the terms of the contract; and that the terms of the contract comprised the entire agreement between the parties. The defendants also conceded the validity of any patent licensed in the contracts.

The defendant Brulotte purchased his machine in 1948; his obligation to pay royalties extended through the 1958 harvest. The defendants Charvet purchased their machine in 1951 and agreed to pay royalties until the completion of the 1960 harvest. The patents listed in the contracts ex- [fol. 215] pired at varying dates, some before the end of the period during which royalties were required and some after that period.

No royalties were paid by either party after the 1952 harvest season. Brulotte used his machine until 1958, but the Charvets did not use their machine after 1952. Apparently, these defendants purchased stationary machines when they stopped using the portable machines, finding them more satisfactory.

No error is assigned to the findings of fact. All of the errors assigned pertain to the interpretation and effect of the contracts. We will deal with these in the order in which they are listed at the beginning of this opinion.

(1) The first contention is that these royalty contracts embodied attempts on the part of the plaintiff to control the use of patented articles after they were sold. Numerous authorities are cited which hold that the sale of a patented article by one holding the patent, or a license to use the patent, puts the patented article beyond the reach of the monopoly conferred by the patent. But in this case, the patented articles were not sold by the patent holder or his licensee. Rather, bare title to the manufactured article was

sold by the manufacturer at the time of the first sale, and the right to use the article was licensed to the purchaser by the patent holder. As the United States Supreme Court said in *United States* v. *Masonite Corp.*, 316 U. S. 265, 86 L. Ed. 1461, 62 S. Ct. 1070,

". . . The test has been whether or not there has been such a disposition of the article that it may fairly be said that the patentee has received his reward for the use of the article."

Under the contracts involved in this action, the manufacturer was paid for the making of the machines, plus a reasonable profit, and conveyed the title; the patentee, on the [fol. 216] other hand, agreed to take his remuneration in the form of royalties, payable over a period of years, which was to the advantage of the purchaser, who was enabled to pay for the use of the machine over a long period of time. There was no reward to the patent owner other than the royalties payable under the contracts. Under the rule laid down in the *Masonite* case, then, there was no such a disposition of the machines when these contracts were entered into, that it could fairly be said that the plaintiff, the patentee, had received his reward for the use of the machines. That reward would not be received until the final royalty payments were made.[1] Consequently, such control as he exercised over the use of the machines during the period when royalties were owed was within the monopoly granted him by the sovereign when the patents were issued.

(2) In regard to the contention that the contracts are illegal because they condition the grant of a license on some patents on acceptance of a license on a larger group of patents, the complete answer is that this is simply not the fact. The contracts do not require the defendants to take a license on all or none of the patents held by the plaintiff; they simply give them a license to use as many of the patented devices or methods as they choose, whether or not

[1] This holding is in accord with the construction which this court gave to identical licensing contracts, for tax purposes, in the case of *Thys* v. *State*, 31 Wn. (2d) 739, 199 P. (2d) 68, cert. den. 337 U. S. 917, 93 L. Ed. 1726, 69 S. Ct. 1158.

they were incorporated in the machines when they were purchased.

None of the authorities cited by the defendants holds a licensing contract of this type invalid. A contract with a similar provision was upheld in the leading case of *Automatic Radio Co.* v. *Hazeltine*, 339 U. S. 827, 94 L. Ed. 1312, 70 S. Ct. 894. There a radio research organization entered [fol. 217] into a licensing agreement with a manufacturer of radio broadcasting receivers, for royalties amounting to a small percentage of the manufacturer's selling price of complete radio broadcasting receivers, whereby it was given the right to use any or all of the patentee's 570 patents and any others which it might acquire. In that case, in an effort to avoid the obligation to pay royalties, the manufacturer made the same contention that is made here, that the contracts were invalid because they "conditioned" the licensing of the use of some patents on the acceptance of others. The court dismissed this contention summarily, remarking that there was no showing in the record that this was the case. The court approved the district court's characterization of the licensing agreement as "essentially a grant by Hazeltine to petitioner of a privilege to use any patent or future development of Hazeltine in consideration of the payment of royalties."

In this case, the trial court did not find, and the contracts in themselves do not reveal that there was any conditioning of the grant of a license to use the machines on an acceptance of a license to use other methods and devices not at that time embodied in the machines. We need not decide whether, if there had been such a condition, it would have rendered the contracts illegal.

(3) The next contention is that the contracts were unenforcible because they licensed the use of patents beyond the 17-year period of monopoly granted by the sovereign. *American Security Co.* v. *Shatterproof Glass Corp.*, 268 F. (2d) 769, is cited in support of that proposition. In that case, the court found that a patentee had refused to grant licenses on patents which the manufacturer had desired to use unless the manufacturer would accept other licenses

[fol. 218] and held that this was a misuse of patents.[2] As a consequence, the patentee was denied recovery in its patent infringement suit. The court then went on to say that a provision that the licensing agreement should continue in full force and effect until the expiration of the last of the patentee's licenses constituted a misuse of patent. No authorities are cited in the opinion, and there is no discussion of the theory that the court used in arriving at this conclusion. It is, in any event, dictum.

The defendants also cite *Prestole Corp.* v. *Tinnerman Products, Inc.*, 271 F. (2d) 146, and *Tinnerman Products, Inc.* v. *George K. Garrett Co.*, 185 F. Supp. 151. These cases do not involve the question of whether royalties can be collected after the expiration of a patent, but simply recognize the indubitable rule that the *monopoly* of a patent cannot be extended beyond the 17-year period.

The great weight of authority, as well as the stronger reasoning, is that parties to a licensing agreement may contract for the payment of royalties beyond the expiration of the patent, although, in the absence of such an agreement, a license contract expires when the licensed patent expires. Among the authorities so holding are *E. R. Squibb & Sons* v. *Chemical Foundation, Inc.*, 93 F. (2d) 475; *Starke* v. *Manufacturers Nat. Bank of Detroit*, 174 F. Supp. 882; *Tate* v. *Lewis*, 127 F. Supp. 105; *H-P-M Development Corp.* v. *Watson-Stillman Co.*, 71 F. Supp. 906; and *Six Star Lubricants Co.* v. *Morehouse*, 101 Colo. 491, 74 P. (2d) 1239. In the latter case, where an attempt was made to avoid the obligation to pay royalties because the contract called for their payment beyond the expiration date of the patent, the court said:

[fol. 219] "There is no legal inhibition against a party contracting to pay royalty on a patented article or formula for a period beyond the date of the expiration of the patents. 48 C. J. 277, § 451; *Mitchell* v. *Hawley*, 16 Wall. (U. S.) 544, 21 L. Ed. 322; *Pressed Steel Car Co.* v. *Union P. R.R. Co.*, 270 F. 518. . . .

[2] The correctness of that decision is open to serious question, but we do not deem it necessary to discuss it here, inasmuch as the facts of that case differ substantially from those in this case.

"Under these circumstances, we do not believe that we should declare, as a matter of law, that the contracts of October 26, 1925, terminated upon the expiration of the patents....

"... When the parties entered into the contract they knew of the expiration date of the patents, and if defendant saw fit to contract for royalty beyond such a time, it may not now complain of an anticipated condition brought about by operation of law."

This is the rule which is set forth in Ellis, Patent Licenses, 3d ed., § 109, p. 128.[2]

In this case, when the parties signed their agreements, the instruments showed on their faces that some of the patents would expire before the end of the period during which the payment of royalties was required. It was undoubtedly understood between them that a 17-year period was a reasonable amount of time over which to spread the payments for the use of the patent. They agreed that the value of the right to use the patents embodied in the machines was at least $500 per year, for the remaining years of the royalty period. There is no legal or equitable reason why they should not be required to perform their agreement.

(4) The allegation that the contracts violate the antitrust laws of the United States is grounded on the contention that they constitute an abuse of patents, which, as we [fol. 220] have already held, is without merit.

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[2] We are aware of a recent contrary decision in *Ar-Tik Systems, Inc.* v. *Dairy Queen, Inc.*, 302 F. (2d) 496 (C. A. 3d 1962). In that case the payment of royalties was required throughout the life of the machines sold. This was held to be a misuse of patents. We may assume that the agreement was enough like those involved in this case to make the rule applicable. We find the reasoning of the earlier cases more appealing, however, and we are not obliged to follow decisions of lower federal courts. *Lamb* v. *Railway Express Agency*, 51 Wn. (2d) 616, 320 P. (2d) 644. It is of interest that the writer of a review of this case in 31 Geo. Wash. L. Rev. 535, observed in a footnote that the agreement involved in the *Hazeltine* case (339 U. S. 827) might be justified by the Court of Appeals for the Third Circuit as a convenient method of payment.

(5) In support of the contention that the contracts were terminated when the defendants ceased to pay royalties, they point to the language of the contracts granting the license:

". . . as long as the terms hereof be fully and faithfully performed and maintained, to use said machine(s), for the purpose for which said machine(s) was/were designed . . ."

and say that this language reveals an agreement that the obligation of both parties should cease in the event of default.

We cannot agree with this interpretation. In regard to this contention, the learned trial judge, in a very able memorandum decision, said:

"I find no substance in the argument of the defendants that the contracts were terminated by the default of the defendants, since it appears to me that under the language of the contracts contained in paragraph six thereof, it was the intent of the parties that the contracts could only be cancelled at the election of the plaintiff in the event of default or payment of royalties. A party should not be allowed to take advantage of his own default unless the language in the contract is clear and specific as to such right. This contract provides that the right to use the machines is conditioned upon full performance by the licensee. The contract is for a definite term and I am convinced from the reading of it that the parties intended that it run for that term. If defendants' contentions are meritorious then the contract would be cancellable at will of the defendants. As stated, I am sure that is not what was intended. I, therefore, hold that the contracts herein were not terminated by the defaults of the defendants."

In cases cited by the appellants, the courts found that the parties had evidenced by their words, agreements that the licenses should terminate on default of the licensees. Such cases are *Mason* v. *Electrol, Inc.*, 292 N. Y. 482, 55 N. E. (2d) 747, *Standard Appliance Co.* v. *Standard Equipment Co.*, 296 Fed. 456, and *Rose* v. *Imbrey*, 37 N. Y. S. (2d) 793. It should be noted that none of the cases involved a licensing agreement pertaining to a manufactured product sold

to the licensee, but rather, all concerned the licensing of patents to manufacturers who might or might not manufacture articles embodying the patents, depending on a number of circumstances. If they failed to use the patents, the [fol. 221] licensor would not be greatly harmed if the contract were terminated, for he could license other manufacturers. But here, if the contracts were to be construed as providing for automatic termination on default of the defendants, the plaintiff would lose his reward for his patents, while the defendants would retain the patented machines. It cannot be supposed that such a result was intended.

Likewise, the contracts involved in the cited cases contained no absolute obligation to pay royalties. The contracts before this court do contain such obligations; according to their language, a minimum royalty is due each year for a definite number of years, regardless of whether hops are harvested. There is no ambiguity, and the trial court correctly so held.

(6) What we have just said disposes of the contention that royalties were not required for years when the machines were not used.

The trial court did not err when it held that none of the affirmative defenses had been established. The judgment is therefore affirmed.

Rosellini, J.

We concur:

Ott, C. J., Hill, J., Hunter, J., Hale, J.

[fol. 222] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 36357

Yakima County Nos. 43538 and 43602

THYS COMPANY, a corporation, Respondent,

v.

WALTER C. BRULOTTE and CECILIA BRULOTTE, his wife, Appellants.

THYS COMPANY, a corporation, Respondent,

v.

RAYMOND CHARVET and BLANCHE CHARVET, his wife, Appellants.

REMITTITUR—Filed October 7, 1963

This is to certify that the opinion of the Supreme Court of the State of Washington filed on June 6, 1963, became the final judgment of this court in the above entitled case on October 4, 1963. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Four Hundred Sixty-eight and 57/100 ($468.57) Dollars in favor of respondent and against appellants and their surety American Surety Company of New York.

The Petition for Rehearing was Denied October 4, 1963.

cc: Court Reporter
Velikanje & Moore
Mr. Charles C. Countryman
Cheney & Hutcheson
Mr. Elwood Hutcheson

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 5th day of October, A. D. 1963.

William M. Lowery, Clerk of the Supreme Court, State of Washington.

[fol. 226] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 227]

SUPREME COURT OF THE UNITED STATES

No. 707—October Term, 1963

WALTER C. BRULOTTE, ET AL., Petitioners,

vs.

THYS COMPANY

ORDER ALLOWING CERTIORARI—February 17, 1964

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Whether it is a misuse to include in a license agreement a provision which perpetuates the monopoly of a licensed patent by a requirement that royalties be paid for the use of the invention after the patent has expired and the invention had been dedicated to the public.

"2. Whether it is a misuse or an antitrust violation to include in a license agreement a provision which extends the monopoly of a patent to unpatented subject matter by a provision which requires the payment of post-expiration royalties."

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.